TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1171~~ ~~749~~ ~~486~~ 186

S. S. ETHERIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT AND GARVER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 12, 1887.

currant silver mony, to be payed att or before the first of May yeerly. It is mutually agreed between the ptenors, that it shalbe improued by our owne people, but incase they shall refuse, then it shalbe at the libertie of the ptnors to admitt of any other, out of the colonie, to improue it with them; and the Court appoint Cornett Studson and Mr. Nathaniel Thomas to make leasses to the ptneors, and to receiue the countryes mony for it for the countryes use, as it is due payable.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 & 2 Pleas before the supreme court of the State of Iowa in a cause therein tried and decided, wherein Sperry, Watt & Garver were plaintiffs and appellees and S. S. Ethridge, defendant and appellant.

Be it remembered that on the 11th day of May, 1886, there was filed in the office of the clerk of the supreme court of Iowa the appellant's printed abstract of record, the same, together with the endorsements thereon, being in the words and figures following, to wit:

Appellant's Abstract of Record.

SPERRY, WATT & GARVER, Appellees,

vs.

S. S. ETHRIDGE, Appellant.

Appeal from Polk circuit court.

H. S. Wilcox, for appellees; P. Gad Bryan, for appellant.

On the 18th day of August, 1882, the plaintiffs filed their petition as follows:

First count. Plaintiffs state that they are a partnership, and during all the times hereinafter mentioned were the owners and
3 entitled to the immediate possession of a stock of general merchandise in a store kept by George W. Hamilton in a building situated, etc., in Knoxville, Marion county, Iowa.

That on the — day of August, 1882, the defendant wrongfully and unlawfully seized and converted to his own use a portion of said stock of goods of the value of $1,500, by reason of which plaintiffs have been damaged in the sum of $450, no part of which has been paid.

Second count. Plaintiffs further state that they are the absolute owners of a lien on and an interest in a stock of general merchandise in a store kept by George W. Hamilton in a building situated, etc., in Knoxville, Marion county, Iowa, of the value of about $450, by virtue of two instruments of mortgage, copies of which are hereunto attached, marked Exhibits "A" and "B."

That on the — day of August, 1882, the defendant wrongfully and unlawfully seized and converted to his own use a portion of said stock, of the value of $1,500, to the great damage of plaintiffs in the sum of $450, no part of which has been paid. If plaintiffs shall recover on their first count herein they will not seek a recovery on the second count.

Wherefore plaintiffs demand judgment against defendant
4 for the sum of $450, with interest at six per cent. from the time of conversion, and the costs of this action. Exhibits "A" and "B" appear in the evidence.

On the 21st day of September, 1882, the defendant filed his answer, as follows:

1. Comes now the said defendant and, answering the plaintiffs' petition, denies each and every allegation thereof.

2. For further answer the defendant says that on or about the 8th day of August, 1882, Marshall Field & Co. commenced suit in the circuit court of the United States for the district of Iowa, at the city of Des Moines, against Charles Douglas and George W. Hamilton by attachment; that under and by virtue of said proceedings a writ of attachment was regularly issued against the property of the said Charles Douglas and George W. Hamilton, and delivered to this defendant, who was then the deputy United States marshal for said district of Iowa, as such deputy marshal, for service; that about the said 8th day of August the defendant, as such deputy marshal and by virtue of said writ, levied the same upon and took possession of the goods mentioned in the plaintiffs' petition, then in the
5 possession of and owned by George W. Hamilton, one of the defendants in said action, by attachment, and subject to lawful seizure by said writ; that the defendant still holds said goods, as such deputy marshal, by virtue of said writ, to be dealt with according to law and the judgment and orders of the said circuit court of the United States; that the defendant never seized or took possession of said goods nor held the same in any other way than as such officer aforesaid and by virtue of said writ.

3. That when defendant levied on said goods they were in the possession of and were the property of said Hamilton, and subject to lawful seizure by said writ, and defendant only took $955 worth thereof and left a large amount of the stock in store where found, and more than enough to satisfy the plaintiffs' claims, all of which plaintiffs could have taken to pay their claims by the exercise of proper diligence.

4. Further, on the 26th of June, 1882, said Hamilton mortgaged his entire stock of goods to Perry, Cook & Tower, of Massachusetts, to secure the payment of $631.32, which was recorded July 4th, and on the same day (July 4) Hamilton executed a mortgage on his entire stock, accounts, notes, and all goods thereafter brought
6 into his store, to the plaintiffs herein to secure $304.62, which was filed for record the same day; that on the day foll-ing (July 5) Hamilton made to plaintiffs another mortgage on his stock, accounts, notes, debts owing to him, and all the profits thereafter made in his business and all the furniture and goods thereafter brought in, to secure $88.14, which was filed for record the same day; and on the next day (July 6) Hamilton executed to O. P. Wright, trustee, a mortgage on his entire stock, furniture, fixtures, accounts, notes, and all goods afterward brought in, to secure certain of his creditors therein named, and provided for the payment of their claims in full, in the order therein named and not *pro rata*, which was filed July 6, 1882, for record; that said mortgages were never delivered and passed no title to the mortgagees or lien upon the said property.

That at the time said mortgages were executed Hamilton was insolvent and made the same in contemplation of insolvency, and that the execution of all of said instruments constituted but one

entire transaction, which in law and fact amounted to and was a general assignment for the benefit of his creditors and included all his property liable to execution; that said assignment, with
7 all of said instruments going to make up the same, is void, because creditors are thereby preferred, and said instruments were made by Hamilton to hinder, delay, and defraud his creditors, who had no knowledge of said assignment and did not consent thereto; that defendant took a part of said goods by virtue of an attachment in an action in the Federal court, wherein Marshall Field & Co. are plaintiffs and said Hamilton is a defendant, as set forth in the second division hereof, which is made a part hereof; that said goods, when taken by said writ, were subject to lawful seizure therewith and were the property of said Hamilton. Demands judgments for costs.

On the 7th day of October, 1884, the defendant filed his petition for a removal of said cause to the circuit court of the United States for the southern district of Iowa, central division, as follows:

To the circuit court of Polk county, Iowa:

Your petitioner, S. S. Ethridge, shows that the plaintiffs, Sperry, Watt & Garver, are citizens of the State of Iowa, and that this petitioner is defendant in said cause; that the amount in controversy, exclusive of costs, exceeds the sum of $500; that the controversy involves the validity of two mortgages executed to said
8 plaintiffs upon a stock of goods of the value of two thousand dollars; that this petitioner took a portion (about nine hundred dollars' worth) of said goods by virtue of a writ of attachment, he being then and ever since deputy U. S. marshal for the central division of the southern district of Iowa, issued by the clerk of the U. S. circuit court of said southern district of Iowa, at the suit of Marshall Field & Co. *vs.* Charles Douglas and George W. Hamilton, and which writ was placed in his hands as such officer for service; that afterwards said goods so attached were sold by order of the said U. S. circuit court and the proceeds of such sale held by your petitioner subject to the further orders of said U. S. circuit court; that plaintiffs bring their action to recover damages of your petitioner for the seizure of said goods and converting the same to his own use; that the validity of said process and of the service thereof is brought in question in this action, and the defense of your petitioner, as shown by his answer herein, is one arising under the laws of the United States; that your petitioner herewith tenders a bond, as required by law in such cases, with good and sufficient sureties, and prays that said suit may be removed to said U. S. circuit court.
9 Said petition, signed and verified, and the bond was in due form and no objection was taken thereto.

On the 17th day of January, 1885, the plaintiff filed an amendment to the petition, claiming as damages $499 and no more. On the 17th day of January, 1885, the court overruled defendant's application to remove the case to the Federal court, and defendant at the time excepted.

On the 22nd day of September, 1885, the defendant filed his motion to substitute Marshall Field & Co. as defendants, as follows:

Comes now the defendant and moves the court that Marshall Field & Co. be substituted as defendants herein for the reasons set forth in the subjoined affidavit:

STATE OF IOWA, *Polk County:*

S. S. Ethridge on oath states that in August, 1882, he was and ever since has been deputy United States marshal in the southern district of Iowa; that about the 8th day of August, 1882, Marshall Field & Co., whose motion and affidavit are hereto attached, served out of the office of the clerk of the United States circuit court for the southern district of Iowa a writ of attachment against Douglas
10 & Hamilton, Chas. Douglas and Geo. W. Hamilton, a certified copy of which is hereto attached and made a part hereof; that as such deputy marshal affiant levied said writ on a portion of a stock of goods in the possession of said Hamilton, which was afterwards sold by order of said United States circuit court; that this action is for the recovery of a portion of the proceeds arising from the sale of said property taken by said process; that this affiant never had any claim upon or interest in said property, and did not take the same in any other way than as such officer and by virtue of such process as aforesaid.

Signed and verified.

Motion and Affidavit of Marshall Field & Co., Referred to Above.

Come now Marshall Field & Co. and move the court to substitute them as defendants herein instead of S. S. Ethridge, for the reasons set forth in the subjoined affidavit.

STATE OF IOWA, *Polk County:*

I, P. Gad Bryan, on oath state that I am attorney for Marshall Field & Co. and the defendant, S. S. Ethridge, in said cause; that said Marshall Field & Co. are the real and only parties in
11 interest in the defense of said action; that the property or proceeds thereof sought to be recovered in this suit was taken by the defendant as deputy U. S. marshal by virtue of a writ of attachment issued at the suit of said Marshall Field & Co. in the U. S. circuit court, as stated in the affidavit of said Ethridge, hereto attached; that said Ethridge has no interest whatever in this action, and never took or held said property, except as stated in his said affidavit.

Signed and properly verified.

Writ of attachment to said motion appears elsewhere in the evidence.

On the — day of September, 1885, the court overruled said motion; to which the defendant duly excepted.

Jury Trial. Begun September 29, 1885.

The plaintiffs, to maintain their action, introduced the following evidence:

JAMES WATT testified:

Myself and Serry are the active members of the firm of Serry, Watt & Garver; know Geo. W. Hamilton. We sold him goods in 1882—several hundred dollars' worth. Exhibit "A" is a correct statement of the amount sold and also the notes given by him and placed to his credit. Part of the goods were sold to Douglas
12 & Hamilton. Hamilton gave us a mortgage on the stock at our request to secure the notes—one for $304.67, the other for $88.54. These sums lacked a dollar of covering the amount he owed us.

Question. Did you have any knowledge of any intent on the part of Geo. W. Hamilton to defraud his creditors?

(Objected to by defendant as incompetent; overruled; defendant excepts.)

Ques. Did the firm of *of* Sperry, Watt & Garver or you have any knowledge that Hamilton, when he executed the mortgages, had any intention to defraud his creditors?

(Same objection, ruling, and exceptions.)

Answer. No; we deemed them and him perfectly honest and able to pay; no part of the notes have been paid. When this transaction took place our firm was composes of myself, Sperry, and Garver. One mortgage was taken July 4th; the other July 5th. The first was for Douglas & Hamilton's account; the last one was for Hamilton's individual account. I cannot tell now why they were not both taken at one time. I cannot now explain how it happened that we took one mortgage on the fourth and sent Wilcox on the fifth to take the other, unless it was that there were two accounts and one was overlooked at the time. We did not know that
13 Hamilton was in failing circumstances at the time. We heard at the time how much of the goods the marshal, Etheridge, had taken. I do not now remember whether our firm made any effort to get the goods remaining after the levy.

O. B. AYERS, for plaintiffs, testified:

I resided and was practicing law at Knoxville, Iowa, in 1882. I knew George W. Hamilton. He was first in with Douglas. The firm was dissolved and business carried on by Hamilton. I know of the plaintiffs; did business for them with Hamilton. I took one of the mortgages in question for plaintiffs. We received the claim for collection or to be secured, and we took this mortgage (Exhibit "B"). I had no knowledge at the time that Hamilton had any purpose to defraud his creditors. We first took a mortgage for

Perry, Cook & Tower about the 29th of June, which their traveling man took away with him, and that is why it was not recorded until July 4th.

Re-examined:

When I took these mortgages I did not know that Hamilton contemplated making any other mortgages. When I took the O. P. Wright mortgage Hamilton refused to make any mortgage unless a list of creditors in the order, as set out in the mortgage,
14 were included. He arranged them in the order they are in. The marshal took a portion of the goods for Marshall Field & Co. and the balance were sold under the Perry, Cook & Tower mortgage, and did not bring sufficent to pay the claim by $71.80.

C. T. SPERRY, for plaintiffs, testified:

The Sperry, Watt & Garver mortgages were taken for the purpose of securing a debt due us. Our firm had no knowledge that Hamilton had any purpose in making the mortgage to defraud his creditors.

(Answer objected to; overruled; defendant excepts.)

H. S. WILCOX, for plaintiffs, testified:

I took the small mortgage from Hamilton to plaintiffs. I did it for the purpose of getting security. I had no knowledge at the time or any other time that Hamilton made the mortgage for the purpose of defrauding his creditors; supposed he made it solely for the purpose of securing the claim.

Plaintiffs next read in evidence mortgage from George W. Hamilton to plaintiffs on the property in controversy, as follows:

In the usual form of chattel mortgages, for the consider-
15 ation of $346.62, conveyed to "plaintiffs all my stock of dry goods and groceries, notions, boots and shoes, book accounts, notes, and merchandise of every description now in my store in Knoxville, Marion county, Iowa, and to include all goods and merchandise which may hereafter be brought into said store," with the usual warranty of title, and to be void on condition that said Hamilton should pay the plaintiffs three notes, dated July 4th, 1882—one for $100, due September 4, 1882; one for $100, due October 4, 1882, and one for $104.62, due November 4, 1882, with interest at the rate of ten per cent." "And I, the said George W. Hamilton, do hereby covenant and agree to and with the said Sperry, Watt & Garver that, in case of default made in the payment of the above promissory notes, or in case of my attempting to dispose of or remove from said county of Marion the aforesaid goods and chattels, or any part thereof, or whenever the said mortgagee or his assigns shall chose so to do, then and in that case it shall be lawful for the said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods or chattels wherever found," etc., etc. Then follows the usual power of sale, and for attorney's fees in case

the mortgage should be foreclosed by suit; and if anything
16 remained after paying plaintiffs' claim it should be paid to the said Hamilton.

Executed and acknowledged on the 4th day of July, 1882, and filed for record the same day, at nine o'clock and thirty minutes a. m.

Plaintiff next introduced a chattel mortgage from said Hamilton to the plaintiffs, for the consideration of $89.54, on the following goods and chattels: "All the stock of merchandise, furniture, and fixtures now in my store in the city of Knoxville and all that may hereafter be purchased and brought into said store, and all books of accounts, notes, and evidence of indebtedness now existing in my favor, or that shall hereafter be made or accrued in my favor, arising out of the business of said store." Then follows the usual form of warranty, to be void on the payment of one promissory note for $89.54, dated July 5th and due July 28th, 1882, with interest at 8 per cent. Then follows: "And I, the said G. W. Hamilton, do hereby covenant and agree to and with the said Sperry, Watt & Garver that in the case of default made in the payment of the above promissory note or in case of my attempting to dispose of or remove from said county of Marion the aforesaid goods and chattels or any part
part thereof, or whenever the said mortgagee or his assigns
17 shall choose so to do, then and in that case it shall be lawful for the said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods or chattels wherever found." Then follows the usual form of power of sale and the payment to Hamilton of the money remaining after the payment of plaintiff's claim, if any.

Executed and acknowledged on the 5th day of July, 1882. Filed for record the same day, at 6 p. m.

Plaintiff next introduced the four promissory notes described in the foregoing mortgages.

Plaintiff next introduced CHARLES F. SPERRY, who testified as follows:

I am a member of the firm of Sperry, Watt & Garver and am acquainted with George W. Hamilton; the four notes introduced in evidence have not been paid and are still due and owing to the plaintiffs; they were given for merchandise bought of plaintiffs by Hamilton on time; the goods for which the notes were given were purchased in the months of April, May, and June. I do not know how it happened that three of the notes are dated July 4th and one July 5th, 1882.

G. W. HAMILTON testified on the part of the plaintiffs as follows:

I know what has become of the property described in these
18 mortgages; the United States marshal—

(Objected to as immaterial, because the issues do not charge defendant as marshal, but as a private individual.)

The name of the man that took the things is S. S. Ethridge. He took out of the store about $950 or $960 worth, as invoiced, but that was not their fair value. I think they are worth at least $1,000 at wholesale prices. He boxed up the goods, took them away, and stored them in a room.

Question. State whether or not he has since had said goods sold.

(Objected to as immaterial, what a trespasser does with goods taken; objection overruled, and defendant excepted.)

Answer. He sold the goods he took away and the goods he left were taken afterwards by the sheriff under a chattel mortgage in favor of Perry, Cook & Tower, of Massachuseets, of older date than the mortgages to the plaintiffs. The sheriff advertised the goods and sold them at auction. I do not know how much he realized for them.

Cross-examination:

The goods left there by Ethridge and taken by the sheriff were worth about $1,200. He took all that was left—the goods, fixtures, and furniture in the store. The $1,200 worth of goods taken by the sheriff includes only the goods; the fixtures, notes, and ac-
19 counts, etc., were not included. They got besides about $400 worth of accounts and $100 worth of fixtures and $135 in bank. At the time I executed the mortgage to Perry, Cook & Tower I owed to all my creditors about $2,800. The value of my stock at wholesale prices when Ethridge took the goods was $2,200. At the time I made the mortgage to Perry, Cook & Tower I owed Marshall Field & Co. $191.31, and I owed J. A. Tollman & Co. something over $400, making what I owed both Marshall Field & Co. and J. A Toilman & Co. a little over $600; saw the amount claimed in the writ of attachment which Ethridge had, and the amount therein claimed was correct, which I believe is $631.31.

(Objected to as improper cross-examination; objection sustained, and defendant excepts.)

Redirect:

I believe the goods taken by the sheriff did not call for quite enough to pay Perry, Cook & Tower. I don't know myself; they said it lacked $275.

Recross-examination:

I was in the store when Ethridge came there and took the goods. I had possession of the goods at the time, and had been in possession of them ever since the 10th of June before, when I bought out Douglas. After Ethridge went away with what goods he took I had possession of the remainder for fifteen or twenty minutes.
20 I went to dinner and had the key of the store. About five minutes after I returned, and while I was in charge of the store, the sheriff came and took the goods.

Redirect examination:

The book at the time the attachment was served showed there was $400 of accounts. Mr. Ayers, attorney for Perry, Cook & Tower, has got them. The notes and accounts were for goods sold to parties. There was some notes also; I do not know exactly how many, but the notes and accounts both amounted to over $400. There was one or two notes for $50. The accounts ranged from $10 to $50 each, and were against parties in Knoxville, and about $65 had been collected on them, but not enough to pay Perry, Cook & Tower and expenses. I have tried some, but not much, to collect the claims, but I don't think Ayers has. I think these notes and accounts are worth $200 and would sell for that in the market.

S. S. ETHRIDGE, on the part of plaintiffs, testified as follows:

I remember of taking possession of some goods at Knoxville as the property of George W. Hamilton. I don't know whether I have got the written demand made of me by the plaintiffs or not. It is my impression I turned it over to my attorney.

21 Question. You may state what the contents of the paper was.

(Objected to by the defendant as incompetent; objection overruled, and defendant excepts.)

Answer. I have no distinct recollection what cases those notices were in, but I think you served a written notice on me for Sperry, Watt & Garver that they held a mortgage on these goods, and demanded a release of them.

Cross-examination:

This notice was given me a few days after I made the levy under the attachment. I did not know at the time I levied that they had a mortgage. The plaintiffs lived in Des Moines, and the writ was levied in Knoxville, Marion county. A few days after I returned from Knoxville I received the notice. I think that was the first I had heard of the plaintiffs having a mortgage on the goods. I did not comply with the demands of the notice.

The plaintiffs rest.

Whereupon the defendant introduced the following evidence:

GEORGE W. HAMILTON, on behalf of the defendant, testified as follows:

The mortgage to Perry, Cook & Tower was for $631.32. That was a claim against Douglas & Hamilton. The goods, for the payment of which the mortgage was given to secure, were bought

22 of Perry, Cook & Tower, all along from February, 1882. The Marshall Field & Co. claim we bought about the same time. About the same time I executed the mortgage to Perry, Cook & Tower I executed two mortgages to the plaintiffs. The goods bought of the plaintiffs were bought all along, from amongst the first goods

we bought to the last. I don't know exactly how it was that I executed two mortgages to the plaintiffs; it seems to me the first mortgage was obtained for plaintiffs by Ayers. I don't know how long he had the claim in his hands. The first I gave was about the 4th of July, and I believe the second was on the 5th.

If I remember, the last mortgage was for goods that I had bought, and the claim was not yet due. I thought I could pay them as they came due, and it was not necessary to put them in the first mortgage. The first mortgage was for a claim against Douglas & Hamilton; the second mortgage was for goods I obtained after I had bought out Douglas. When I made the first mortgage there was no objection to it then, but Wilcox came to see me about it afterwards. I don't know whether he came on the 4th of July or the 5th. I think I made the mortgage the day he came down; the next day afterwards I executed another mortgage to O. P. Wright. O. B.
23 Ayers came to me with four or five claims—Perkins & Gray, Newman & Ullman, Marion County Bank, Nora A. Hamilton, and Chapin & Merritt—and wanted them secured. The claim in favor of the bank was for money I owed them on overdrafts, about the 10th of June, The claim of my sister, Nora Hamilton, was made about the 10th of June. I owed Perkins & Gray since the 10th of March, and the Chapin & Merritt claim was partly against the old firm and partly against me. The Newman & Ullman claim was an old debt against the firm. The claim of Boyle & Huntington was part the old firm and part my own. The claim of Chapman Bros. & Co. was mostly firm claim. On the 6th of July Ayers came to me with the claims he represented and wanted me to secure them. I don't remember whether he told me why he wanted them secured or not; he wanted me to give him a mortgage on the stock of goods. I told him I didn't want to be giving any more mortgages, and if I gave another I would give it for all of my creditors, and wind the thing up and be done with it. He wanted me to give mortgages for these parties he represented. I told him I would do nothing of the kind, but that I would give a mortgage for all, and if he would not take that he could go ahead, and he said he
24 would take it. He suggested listing the creditors, and had the parties he represented put in first. He then said "How do you want the rest in there?" I told him I had the ledger, and I took it and read them as they came, and he put them down on a piece of paper as I read them, and put them in the mortgage. At the time I executed the mortgage to Perry, Cook & Tower I don't know that any arrangements were made with Mr. Ayers about not having it recorded at that time, and I don't know why it was not recorded until the 4th day of July. I don't know exactly when the mortgage to Perry, Cook & Tower was given, but it seems to me it was somewhere along in the last of June.

At the time I executed the first mortgage to Sperry, Watt & Garver it was understood between Mr. Ayers and me that I was to go on selling goods in the ordinary way, and that I would be able to pay out. I was to use the money received from the sale of goods and use some of the money to buy goods, and I was to pay out of the

proceeds the running expenses of the establishment and to take out whatever was needed for the support of myself and family, and to use the money in buying goods as I saw proper in carrying on the business, filling up the stock, and all that, and the money
25 deposited in the bank that I did not need for the other purpose was to be applied on the payment of the debt. At the time the marshal came down with the writ, O. P. Wright, mortgagee in the last mortgage, was cashier of the Marion County Bank, and I suppose he was there at the time. After those mortgages were executed he did not meddle in any way with my business. I deposited in his bank every day the same as any other bank. I did not agree with Ayers that I would deposit money in that bank. Wright asked me if I was going to deposit in his bank, and I said I was—every day as I had before—and I carried on the business the same as before, and I checked out the money for whatever I wanted. Sperry, Watt & Garver never objected to that way of managing the business after I gave them the mortgages. At the time I gave Wright the mortgage it was arranged between me and Mr. Ayers that I was to have entire charge of the business and to conduct it in the way I have stated. At the time I gave Sperry, Watt & Garver the mortgages they said they would give me all the time I wanted. They said they would not push me just as long as I needed things, and they saw I was trying to do right. I told them when I did not do that I wanted them to push me,
26 and my understanding with Mr. Ayers was that I was to carry on business the same as before, as long as I desired to and did what was right. At the time I executed the mortgage to O. P. Wright the same was understood as long as I run the thing honest. Before the mortgage was made to O. P. Wright I asked him if he would accept and he said he would. After the mortgage was executed to O. P. Wright Ayers had it in his charge. I don't remember that I saw it again. At the time I gave the mortgage to Perry, Cook & Tower I made the same arrangements with Mr. Ayers, their attorney, that I did with the rest of them, that I should run as long as I acted fair, and if I did what was right they were not going to put me to any trouble, and I was to go on as I always had been doing as long as I did what was right, and that was what they all agreed to do who had mortgages. After I executed the mortgages to Sperry, Watt & Garver they sent a man there every two weeks to sell goods and look after their business, just the same as they had been doing before I made the mortgages. After that I paid cash for the goods I bought of them. The plaintiffs did not in any way meddle with the business after I
27 made the mortgages more than they did before. After the marshal took the goods the plaintiffs sent Wilcox down there to see how things stood. I think he came down two or three days afterward.

Cross-examination:

I understood it this way: That I was to pay them, of course, but was to stay in possession of the goods as long as I acted honest. I

was to sell the goods at retail and apply the proceeds to the mortgages and for any other purposes; they reserved the right to take possession whenever they wanted to under the mortgages. When I made the mortgages to the plaintiffs I was indebted to them in the full amount secured thereby. They demanded payment or security and threatened to sue me if I did not give it; I had not the money to pay them; they demanded the money or the mortgages. Perry, Cook & Tower's attorney presented to me a mortgage and I signed it. The parties named in the mortgage executed to O. P. Wright had just claims against me; the ones demanding security were placed first on the list. The mortgage was drawn up by Stone & Ayers, their attorneys, and presented to me for execution. I had some property not included in the mortgage in Illinois, an interest in a lot worth $140, and accounts worth $185, that was not
28 included in the mortgages.

Redirect:

At the time I executed the mortgages I had no property in Iowa subject to execution except what was covered by the mortgages. The property in Illinois that I had an interest in belonged to my father's estate. Since the attachment I sold my interest in it for $140. I was to live out of the business and to buy what goods I needed in the store. I did not use any of the money except in buying goods I had to have and in paying debts, I did not use any of it for my support. I paid some of the creditors' debts in the list in the mortgage out of the order as therein directed, in this: Some of them had accounts in the store and I paid their claims in that way. They were Cunningham, Hoffman, Greenlee & Burns, Mathews, and Black & Bonebrake. I do not know that the mortgagees knew I was paying these parties. I did it and thought it would be all right.

Recross-examination:

I paid off a mortgage given before the one to Perry, Cook & Tower to a Burlington house for about $150 and I paid Perry, Cook & Tower $100 after the attachment was levied, out of the money
29 in the bank which I deposited each day from sales; that is the money I referred to that was paid in there to be applied on the debts in their order as they become due. That's the way in which I paid out the money on claims.

S. S. ETHRIDGE, on behalf of the defendant, testified as follows:

I was deputy United States marshal in August, 1882. In the early part of August of that year a writ of attachment was issued from the circuit court of the United States for what was then the southern district of Iowa, at the suit of Marshall Field & Co. against Charles Douglas and George W. Hamilton. This is the writ of attachment referred to, marked Exhibit "1." This writ I received the 8th day of August. It was placed in my hands as deputy marshal for services. I proceeded with it to Knoxville, levied it upon a portion of a stock of goods which I found in the

possession of George W. Hamilton. I levied upon $955.98 worth, as invoiced by appraisers appointed for that purpose, namely, Mr. Black and Mr. Burns, of Knoxville. Mr. Hamilton was in the store, at the time I went in, selling goods to a customer. There was no one else in charge but him. I served the summons on him and told him I had a writ of attachment, which I produced and
30 read to him, and told him I would have to take possession of enough goods to satisfy the claim. He made no more objection than is usually made in such cases. He did not disclaim being the owner of the goods, or anything of that sort. He appeared to be transacting the business while I was levying the writ and invoicing the goods. There was no one there claiming possession. When I was about half done the invoice Mr. Ayers came in, representing Perry, Cook & Tower and some other parties, and said he had some mortgages on the goods. Ayers was the only one that came in. I am not sure whether he claimed to represent the plaintiffs or not. I didn't see anything of Mr. Wilcox there. After I had invoiced the goods and boxed them up I turned over the keys of the store and delivered back the possession to Hamilton. I took possession between 4 and 5 p. m., and left about 11.30 a. m. the next day. I left in the store some dry goods and notions, and a small stock of groceries and some boots and shoes. I stowed away the goods I took in Knoxville and locked them up. I took no goods out of the store except what I took by the levy of the writ of attachment. I never converted any of it to my own use, and I am
31 still holding the proceeds of the property. The goods were sold afterwards by order of the court, and the proceeds are subject to my control, to be applied in accordance with the order of the court that issued the writ. That is the only claim I ever had on the goods and the only way I ever held them.

Cross-examination:

The writ of attachment was against the property of Charles Douglas and George W. Hamilton, and not against the property of these plaintiffs, Sperry, Watt & Garver.

The defendant next introduced the writ of attachment and the return thereon, marked Exhibit "No. 1," as follows:

UNITED STATES OF AMERICA, } ss:
District of Iowa, }

The President of the United States to the marshal of said district, Greeting:

Whereas Marshall Field, Lorenzo G. Woodhouse, Henry J. Willing, Harlan Higginbotham, Joseph N. Field, and Henry Field, composing the firm of Marshall Field & Co., have filed their petition in the clerk's office of our United States circuit court in and for the district of Iowa, duly sworn to according to law, claiming of Charles Douglas and George W. Hamilton, composing the firm of Douglas

& Hamilton, the sum of $634.19, and alleges "that the de-
32 fendants have disposed of their property with intent to de-
fraud their creditors," and asking a writ of attachment against the lands and tenements, goods and chattels, rights and credits, of the said Charles Douglas, George W. Hamilton, and Douglas & Hamilton:

Now, therefore, you are hereby commanded to attach the lands and tenements, goods and chattels, rights and credits, of the said Charles Douglas, George W. Hamilton, and Douglas & Hamilton (except such as is exempt from execution), wherever the same may be found in your district, or so much thereof as may be necessary to satisfy said sum of $634.19, with interest and costs, and safely preserve the same, to be dealt with as required by law; and of this writ you will make due and legal service and return to our said court on or before the first day of the next term thereof.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Des Moines, in said district, this 8th day of August, A. D. 1882, and of our Independence the 107th year.

[SEAL.] EDWARD R. MASON,
Clerk U. S. Circuit Court, District of Iowa.

The return on said writ shows that it was levied upon the
33 goods of George W. Hamilton of the value $955.98 on the 8th day of August, 1882.

The defendant next introduced a mortgage from George W. Hamilton to Perry, Cook & Tower for the consideration of $631.31, conveying in the usual form to Perry, Cook & Tower the following chattels, to wit: "My general stock of merchandise in my store, in the city of Knoxville, Iowa." Then follows the usual form of warranty, to be void on condition that the said Hamilton should pay the mortgagees three promissory notes, of date June 26, 1882, for $210.44, each due, respectively, August 26, September 26, and November 26, 1882, with interest at eight per cent. Then follows:

"And I, the said George W. Hamilton, do hereby covenant and agree to and with the said Perry, Cook & Tower that in case — default being made in the payment of the above promissory notes, or in case of my attempting to dispose of or remove from said county of Marion the aforesaid goods or chattels or any part thereof, or whenever the said mortgagee or his assigns shall choose so to do, then and in that case it shall be lawful for the said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods and chattels wherever found." Then follows the usual
34 power of sale and a covenant to pay attorneys' fees if the mortgage should be foreclosed by suit; and, after paying plaintiffs' claim, the remainder, if any, to be paid to the said Hamilton.

Executed and acknowledged the 26th day of June, 1882, and filed for record the 4th day of July, 1882, at 9.15 a. m.

The defendant next introduced a mortgage from George W. Ham-

ilton to Sperry, Watt & Garver, dated July 4, 1882, and filed for record at 9.30 o'clock a. m. This mortgage is sufficiently set out in plaintiffs' evidence.

The defendant next introduced a mortgage from George W. Hamilton to Sperry, Watt & Garver, dated July 5, 1882, filed for record the same day, at 6 o'clock p. m. This mortgage is sufficiently set out in the plaintiffs' evidence.

The defendant next introduced in evidence a mortgage from George W. Hamilton to O. P. Wright, as trustee, dated July 6, 1882, and filed for record the same day, as follows:

Know all men by these presents that I, George W. Hamilton, of, etc., in consideration of $1,712.45, to me in hand paid by O. P. Wright, trustee of, etc., have bargained and sold — by these presents
35 to grant and convey unto O. P. Wright, trustee, to secure the payment of the debts of Douglas & Hamilton and George W. Hamilton, a list of which is hereto attached, marked Exhibit "A," and made a part of this mortgage, the following goods and chattels, to wit: "All of my stock of dry goods, notions, groceries, queensware, wooden ware, fixtures, furniture, and all goods, furniture, fixtures of all kinds and descriptions now in my store now occupied by me, in the city of Knoxville, Marion county, Iowa; also all book accounts, notes, and evidences of indebtedness now owned by me coming and growing out of said business, the intention being to convey all and everything in or connected with said store; also all goods of whatever description that may hereafter be brought or put therein by me; to have and to hold the same forever in trust for the payment of said debts, as shown by Exhibit 'A,' hereto attached and made a part hereof, upon condition, however, that said George W. Hamilton shall pay said claims in the order listed, the intention being to secure said debts in the order in which they are listed. And I covenant and agree with O. P. Wright, trustee, that in case of default made in the payment of said claims when due, or in case of my attempting to dispose of, except in the ordinary course of trade, under the super-
36 vision of said O. P. Wright, trustee, or in case of my attempting to remove from the said county of Marion the aforesaid goods and chattels, or any part thereof, or whenever the said mortgagee or his assigns shall choose so to do, then in that case it shall be lawful for the mortgagee or his assigns to take immediate possession of said goods and chattels wherever found." Then follows the ordinary form of power of sale, and for the payment of attorneys' fees in case suit is brought to foreclose the mortgage, and then proceeds as follows: "The proceeds of the goods mentioned in this mortgage, after paying costs and expenses, to be paid on said claims in the order in which they are listed—and this mortgage is subject to all mortgages previously made by me on said goods and chattels—the money remaining after paying said sums, if any, to be paid on demand to said Hamilton."

Witness my hand and seal this 6th day of July, 1882.

GEORGE W. HAMILTON.

Here follows an acknowledgment, in the usual form, before S. P. Ayers, notary public.

EXHIBIT "A."

List of Indebtedness of George W. Hamilton Secured by Mortgage to O. P. Wright, Trustee, Hereto Attached.

37 Marion County Bank, $68.04; Nora A. Hamilton, $215.04; Perkins & Gray, $77.49; Chapin & Merritt, $43.21; Newman & Ullman, 69.70; Boyle & Huntington, $103.00; Chapman Bro. & Co., $45.50; Eagle Steam Bakery, $16.65; J. S. Cunningham, $18.00; H. Hoffman, $50.00; Greenlee & Burns, $2.50; A. J. Kerr, $2.00; Minus, Miller & Co., $2.19; J. W. Manning, $25.25; B. A. Mathews, $5.06; Stapp & Co., $113.10; Tone Bros., $107.28; Taggart & Hindman, $6.00; Black & Bonebrake, $7.00; J. A. Tallman & Co., $300.00; Tyselling Bros., $106.15; Snow & Huber, $43.31; Rollins & Langan, $57.93; Manning & Slater, $4.75; Luberger & Pilger, $16.50; Marshall Field & Co., $191.30; Eddy & Eddy, $15.50; total, $1,712.45.

The foregoing mortgages are marked, respectively, Exhibits 2, 3, 4, and 5.

It is admitted that George W. Hamilton has no property subject to execution at the present time.

BRYAN: And that he had nothing subject to execution in Iowa at the time he executed these mortgages.

WILCOX: That has been proved, and I am willing to let it stand as proved but not as admitted.

The foregoing was all the evidence introduced on the trial of said cause.

After the close of the evidence the defendant, at the proper time, asked the court to give the jury the following instructions:

38 1. If the jury find from the evidence that the mortgagor in the chattel mortgages in evidence in this case was left in possession of the stock of goods mortgaged, with no provision for the application of the entire proceeds of sales to the payment of debts secured by the mortgages, but with the privilege, express or implied, of continuing the business of buying and selling as before the making of the mortgages and applying a portion of the proceeds of sale to his own use, then such mortgages are fraudulent and void in law as to creditors.

2. If the jury find from the evidence that at the time George W. Hamilton executed the mortgages in evidence he was insolvent, and that the said mortgages were made at or near the same time and covered all of the mortgagor's property subject to execution, and that the execution of said papers constituted and were really but one transaction, and that he made the mortgages for the purpose of winding up his business, giving therein preferences as among his creditors, it is in law a general assignment, and is void as to all the creditors who do not consent thereto.

3. If the jury find from the evidence that the plaintiffs herein were not entitled to, nor were not in actual possession of, the

goods levied on by defendant herein, then they cannot recover in this action.

4. If you find from the evidence that plaintiffs or their agent made an arrangement with the attachment defendant, Hamilton, that he was to have possession and full control of the property mortgaged, and that any part of the same was to be converted to any use other than the discharge of the mortgage indebtedness, then the execution of said mortgages was fraudulent and void as against his creditors.

5. Chattel mortgages may be fraudulent and void as to creditors of the mortgagor, even when he had no actual fraudulent intent when executing the same, if their effect is to hinder, delay, and defraud said creditors.

6. If the said Hamilton, at the time he executed the mortgages to plaintiffs, could not pay his debts as they matured in the regular and ordinary course of business he was insolvent.

7. If you find from the evidence that the defendant, when he took possession of the goods in question, was deputy United States marshal, and seized said goods by virtue of a valid writ of attachment issued from the United States circuit court, and in the hands of defendant as such officer for service, and that he still holds said goods or the proceeds thereof as such officer and by virtue of said writ, then you will find for defendant.

8. If you find from the evidence that Geo. W. Hamilton was insolvent when he executed the mortgages to plaintiffs, and that he mortgaged to them his entire stock of goods and fixtures and property in his store, and debts due him, and all goods that might thereafter be put into his stock, for a small sum of money compared with the property so mortgaged, with an agreement or understanding between him and plaintiffs that he should remain in possession of the mortgaged property and carry on his business for an indefinite time, such facts and circumstances are proper to be considered by you as tending to show that said mortgages are fraudulent as to existing creditors of said Hamilton.

9. If you find that after defendant took away the goods levied on by him there was amply sufficient left of said property mortgaged to pay plaintiff's claim against Hamilton, and the plaintiffs failed to use proper care to take said property and apply the same to the payment of their claim; they cannot recover in this action.

10. If the jury find from the evidence that Hamilton, the mortgagor, was left in possession of the mortgaged property, with the privilege, either express or implied, of continuing the business of buying and selling goods and carrying on the business as before the execution of the mortgages to plaintiffs, and of applying the proceeds to his own use, then such transactions are to be considered as evidence properly tending to show that said mortgages are fraudulent.

11. If you find from the evidence that when the said Hamilton executed to plaintiffs their mortgages they made arrangements with said Hamilton to the effect that he should carry on business as theretofore and use a part or all of the proceeds of the sale of the

mortgaged property for the support of himself and family, such arrangement is evidence tending to show that the mortgages are fraudulent as to other creditors of said Hamilton.

The court refused to give each of said instructions except the eighth; to which ruling in refusing to give each of said instructions refused the defendant at the time excepted.

The court then gave to the jury the following statement of issues and instructions:

Statement of Issues.

The plaintiff brings his action against the defendant to recover the sum of $490; and as cause of action alleges in, substance, in his petition, that on the — day of ——, 1882, defendant wrongfully and unlawfully seized and converted to his own use a portion of
42 a stock of goods, of the value of $1,500, in a store occupied by Geo. W. Hamilton in Knoxville, Iowa, upon which goods plaintiff claimed to hold chattel mortgages, executed by Geo. W. Hamilton, one to secure the sum of $304.62, executed the 4th day of July, 1882, and recorded July 4, 1882, at 9.30 o'clock a. m., in the recorder's office of Marion county, Iowa, and the other for the sum of $89.54, executed the 5th day of July, 1882, and recorded the 5th day of July, 1882, at 6 o'clock p. m., in the recorder's office of Marion county, Iowa, the former of said mortgages to secure notes bearing ten per cent. and the latter bearing interest at eight per cent. from date. The execution of the above mortgages and notes they were given to secure by Geo. W. Hamilton to the plaintiff is either admitted or conclusively established.

It is claimed by the defendant that said mortgages were executed by said Geo. W. Hamilton and received by plaintiffs for the purpose of defrauding the creditors of Geo. W. Hamilton, and that said mortgages are void as to the creditors of said Hamilton, and that the defendant Ethridge, United States marshal, seized said stock of goods under an attachment properly issued to him as United States marshal at the suit of certain creditors of Geo. W. Hamilton.
43 The issue submitted to you is this: Were the mortgages of plaintiff executed in good faith and for the purpose of sucuring a *bona fide* indebtedness due to them from Geo. W. Hamilton at the time, or were the same executed by Hamilton and received by the plaintiffs for the purpose of defrauding creditors of Geo. W. Hamilton; and as bearing upon this issue the court gives you the following instructions:

I.

The court instructs you as to the law only. You are the exclusive judges of the facts and the weight of evidence and credibility of witnesses, and it is your duty to decide the case upon the ev-dence admitted and the law as given by the court, and nothing else. You should give to the testimony of each witness and to the aggregate testimony of all the witnesses such credit and weight, and such credit and weight only, as you believe it entitled to.

I½.

The defendant has the burden of proof upon the issue above submitted to you, and to entitle him to a verdict he should show by a preponderance of evidence that the mortgages of plaintiff were fraudulent as to the general creditors of Geo. W. Hamilton.
44 By the term preponderance of evidence is meant the greatest weight of evidence.

II.

The plaintiffs, if they held a valid claim against George W. Hamilton, had a right to demand that the same be secured, and if they in good faith received the mortgages set forth in the petition and that have been introduced in evidence, the same would be valid, even if you should believe that Hamilton at the time was insolvent, and the mortgages would be valid in law, though Hamilton was permitted to remain in possession of the mortgaged property, if the mortgages were properly recorded.

II½.

In determining the question of fraud in the execution of mortgages you should take into consideration all the evidence that has been introduced bearing upon that question. Fraud is never presumed, but must be proved by the party alleging the same, and in determining whether or not there was fraud in any transaction you should consider all the circumstances of the case, and while the debtor retaining possession or the fact of the insolvency of the mortgagor do not, as a matter of law, determine the transaction to be fraudulent, yet in determining the question of fact you
45 may consider the insolvency of the mortgagor, if he was insolvent, the fact of his retaining possession of the goods mortgaged, if he did so retain them, and what agreement, if any, was made between the parties with reference to the disposition that should be made of the goods so in his possession; and from all the evidence and circumstances in the case you will determine whether the transaction between the plaintiffs and Hamilton were in good faith or whether they were designed and intended by the parties to defraud the other creditors of Hamilton.

II¾.

If you believe from the evidence that the mortgages to plaintiffs were given to secure a valid indebtedness to plaintiffs, you are instructed that he had a right to take such security, and the same would be valid, even though the plaintiff- knew that the mortgagor was insolvent, and the effect of taking such mortgages would be to prevent other creditors of said Hamilton from collecting their debts.

III.

It would not be enough to destroy the validity of plaintiffs' mortgages, if you find them valid in other respects, that plaintiff- knew

that the mortgagor was insolvent or that they knew Hamil-
46 ton, in making said mortgages, intended to give a preference to these plaintiffs over other creditors. Before such transactions could be held invalid as a fraud upon other creditors of said Hamilton you should find from the evidence that the purpose of the mortgagor was to defraud other creditors, and that the plaintiffs took said mortgages with knowledge of the mortgagor's fraudulent intention and with the purpose, on their part, of assisting the mortgagor in carrying out his fraudulent purpose.

IV.

If you should find that the mortgages were executed in good faith then you are instructed that the plaintiffs are entitled to recover in this action the amount of damages, if any, they have sustained by reason of the seizure and conversion of the property in controversy by the defendant. If, on the other hand, you determine that the transaction between plaintiffs and said Hamilton were had for the purpose of defrauding the creditors of Hamilton, then the mortgages of the plaintiffs would be void and your verdict should be for the defendant.

V.

If you find for plaintiffs you will allow them the amount of their notes, with interest thereon, as provided therein,
47 from the date of the seizure of the goods by the defendant to the date of your verdict, not exceeding, however, the sum of $499.00.

VI.

The court, at the request of plaintiffs, submits to you two special questions for you to answer in connection with your verdict. It is your duty to answer these questions upon the evidence and the law as given you by the court in this charge.

VII.

If you find that the purpose of plaintiffs, Sperry, Watt & Garver, in procuring the mortgages in controversy was to secure their own claims and not to assist G. W. Hamilton to defraud his creditors, you will find for the plaintiffs.

Special Questions.

1. Did Hamilton execute the mortgages to plaintiffs for the purpose of defrauding his creditors?

2. Did plaintiffs know of any fraudulent purpose on the part of Hamilton when they received said mortgages?

The foregoing instructions were all that were given. To the giving of each of said instructions, statement of issues, and special findings the defendant objected and excepted at the time.

Verdict.

On the 30th day of September, 1885, the jury returned a
48 general verdict for plaintiff- and assessed their damages at $499, and answered both special questions in the negative.

On the 30th day of September, 1885, the defendant filed his motion for new trial, for the reasons:

1. The verdict is contrary to law and evidence.
2. The court erred in giving each of the instructions given.
3. The court erred in its statement of the issues.
4. The court erred in not fully stating the issues.
5. The court misstated the issues to the jury.
6. The court did not state and submit to the jury all the issues in the case.
7. The court erred in refusing to give each of the instructions—1, 2, 3, 4, 5, 6, 7, 9, 10, 11—asked by defendant.
8. The court erred in admitting improper evidence against defendant's objections.
9. The court erred in rejecting proper evidence offered by defendant.

Judgment.

On the — day of September, 1885, the court overruled said motion and rendered a judgment in favor of plaintiffs for $499.00 and costs; to all of which the defendant at the time excepted, and
49 was allowed till April 1, 1886, to prepare and file a bill of exceptions.

On the 1st day of March, 1886, the defendant filed his bill of exceptions, containing all the evidence offered or admitted on said trial and the rulings of the court thereon, and all the instructions given and refused, as hereinbefore set forth.

On the 5th day of March, 1886, the defendant perfected his appeal to the Supreme Court by filing in the office of the — of said circuit court a notice of appeal properly served on the plaintiffs and on said clerk.

Assignment of Errors.

The appellant says that there is manifest error, to his prejudice, shown by the foregoing abstract of record, as follows, viz:

1. In refusing defendant's application for a removal of the case to the Federal court.
2. In overruling defendant's motion to substitute Marshall Field & Co. as defendants.
3. In overruling defendant's motion for a new trial.
4. In refusing to give each of the instructions asked by the defendant.
5. In giving each of the instructions given.
50 6. In not fully and correctly stating the issues to the jury.
7. In not submitting a part of the material issues to the jury.

8. In admitting and rejecting evidence as shown by the record.
9. In rendering judgment for the plaintiffs.

Endorsed.

"I hereby acknowledge service of this abstract and the receipt of 2 copies, at Des Moines, Iowa, this — day of April, 1886.

"H. S. WILCOX,
"*Att'y for Plaintiffs.*"

51 On the 16th day of June, 1886, said cause was duly submitted to the supreme court of Iowa on the foregoing record and the same having been fully considered said court filed its decision of said cause on the 25th day of October, 1886, the same being in the words and figures following, to wit:

SPERRY, WATT & GARVER *vs.* S. S. ETHRIDGE, Appellant.

Appeal from Polk circuit court.

Action at law; trial by jury; judgment for the plaintiff, and defendant appeals.

N. W. Bliss and P. Gad Byran, for appellant; H. S. Wilcox, for appellees.

SEEVERS, *J.:*

52 There are two counts in the petition. The first states that plaintiff was the owner of a stock of merchandise of the value of $1,500, which the defendant wrongfully took and diverted to his own use. The second count states that the plaintiff had a lien on a stock of merchandise under and by virtue of two mortgages executed by Geo. W. Hamilton to the plaintiff; that said merchandise is of the value of $1,500, and that the defendant seized and converted the same to his own use, and judgment was asked for $450, with interest. In 1882 the defendant answered the petition and pleaded — he, as deputy United States marshal, seized the goods under an attachment issued in a suit pending in a circuit court of the United States in favor of Marshall Field & Co. against Charles Douglas and Geo. W. Hamilton, and justified the seizure under such process. The defendant also pleaded that he did not seize all of the merchandise covered by the plaintiff's mortgage, but left a sufficient amount to more than satisfy the same, and that Perry, Cook & Tower had a prior mortgage on said goods, and thereunder were entitled to possession, and therefore it is claimed that the plaintiff, as second mortgagee, cannot maintain this action.

53 I. It is insisted that under sec. 3016 of the code the plaintiff should have presented its claim to the goods to the court out of which the attachment issued. That section in substance provides that any person other than the attachment defendant who disputes the validity of the attachment or who has any interest in or lien on the property attached may intervene in said action and have his right determined in a summary manner. We think this

section simply provides an additional remedy which the plaintiff might have adopted, but was not bound to do so.

II. Under their mortgage, Perry, Cook & Tower were entitled to the possession of the merchandise—Code, sec. 1927—and so was the plaintiff as against all persons except Perry, Cook & Tower. The defendant, by the seizure under the attachment, obtained such right to the possession of the merchandise as the attachment defendant had and no more. It therefore follows that the right of the plaintiff to the possession of the goods is superior to that of the defendant. As between Perry, Cook & Tower and the plaintiff it may be conceded that the right of the former is superior to that of the latter; but the defendant does not claim under Perry, Cook & Tower,
54 but adversely to them and the plaintiff; he justifies the seizure under the attachment, and therefore cannot shield himself from liability if the plaintiff, under his mortgage, has such a right, interest in, or lien on the merchandise as will enable it to maintain this action.

The plaintiff, as we have said, was entitled to the possession of the goods as against all the world, except the prior mortgagees, and can, we think, maintain an action for a taking which was not in pursuance of the prior mortgage and in defiance of the right of the first mortgagees. It was so held in Goldsmith *vs.* Wilson, 69 Iowa, 662; Newman *vs.* Tymerson *et al.*, 13 Wis., 172. See also Hotchkiss *vs.* Hunt, 49 Me., 213; Morrill *vs.* Keys, 14 Allen, 222. In Googins *vs.* Gilmore, 47 Me., 9, it is said: "It is well-settled law that an action will lie for damages to a reversionary interest in personal property," citing Forbes *vs.* Parker, 16 Peck, 462. As the plaintiff was entitled to the possession he can well maintain an action to vindicate such right, or he can well maintain an action of tresspass to recover damages which he has sustained by the wrongful act of the defendant in depriving it of such right. We deem it proper to say that the merch-dise covered by the mortgages which was not seized
55 by the defendant was taken and sold under the prior mortgage.

III. It is said that, as the defendant seized the goods in his official capacity under process which issued out of the circuit court of the United States, and that he holds the goods subject to the order of said court, is a bar to this action. The process under which the defendant was acting directed him to attach the property of Charles Douglas and Geo. W. Hamilton. Such process did not authorize him to attach the property of any one else. He therefore was not justified in seizing the property of the plaintiff. Buck *vs.* Colbath, 3 Wall., 334; Sharp *vs.* Doyle, 102 U. S., 686.

IV. In 1884 the defendant filed a petition asking that the cause be transferred to the United States circuit court on the ground that the merchandise had been seized under process which issued out of such court, and that the validity of such process and the service thereof is involved in this action. The relief asked was refused. Counsel for the appellant have not cited the statute of the United States or any authority upon which they rely, and therefore we deem it sufficient to say that we suppose the court declined to trans-

fer the case because the application was not made at the term at which the cause could be first tried, and that in so doing
56 it did not err.

V. The defendant also asked that the attachment plaintiffs be substituted as defendants. This was refused, and it is claimed that under sec's 2572, 2573, and 2574 of the code the court erred in this respect. The sections cited have reference to actions for the recovery of specific personal property, and this is not such an action.

Objections are made to the instructions given, and it is urged that certain instructions asked should have been given. We deem it sufficient to say that in our opinion the instructions given are clearly correct, and that they cover the whole ground. The judgment of the circuit court is affirmed.

And on the same day a final judgment was ordered and duly entered of record in said cause, the sane being in the words and figures following, to wit:

"SPERRY, WATT & GARNER *vs.* S. S. ETHRIDGE, Appellant.

Appeal from Polk circuit court.

In this cause the court, being fully advised in the premises,
57 file their written opinion affirming the judgment of the circuit court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *proce-ndo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $12.75, and that execution issue therefor."

On the 14th day of September, 1887, there was filed in the office of the clerk of said court a petition for writ of error as follws:

"UNITED STATES OF AMERICA, *State of Iowa:*

To the Honorable Austin Adams, chief justice of the supreme court of Iowa:

The petition of S. S. Ethridge respectfully shows that on the 25th day of October, 1886, a final judgment was rendered against your petitioner for the sum of four hundred and ninety-nine dollars and for costs, as will appear by reference to the record and proceedings in said cause.

Your petitioner shows that said judgment was rendered by
58 the supreme court of the State of Iowa in a certain cause wherein Sperry, Watt & Garver were plaintiffs and S. S. Ethridge, you- petitioner, was defendant, and that said court is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under section 709 of the Revised Statutes of the United States.

Because in the said cause your petitioner prayed for a removal of the same to the circuit court of the United States in and for the central division of the southern district of Iowa on the ground that the defense of your petitioner was one arising under the laws of the States, and the decision of the said supreme court thereon was adverse to your petitioner.

Because in the said cause your petitioner was sued for the alleged wrongful seizure and conversion to his own use of a stock of merchandise claimed by the plaintiffs in said cause to belong to them; but your petitioner claimed that when he took the same he was a deputy marshall of the United States for the district of Iowa and was acting in obedience to a writ of attachment issued in a
59 cause pending in the circuit court of the United States for said district, wherein Marshall Field & Co. were plaintiffs and Charles Douglas and George W. Hamilton were defendants; that said writ was against the property of said defendants; that your petitioner executed the same by levy upon the said merchandise then in possession of and owned by said Geo. W. Hamilton and subject to lawful seizure under said writ, and held the same as such deputy marshall under said writ, to be dealt with according to law and the orders and judgments of said circuit court, and the decision of said supreme court thereon was adverse to your petitioner.

Because in the said cause your petitioner claimed that the mortgages under which the plaintiffs claimed the said merchandise were fraudulent and void as to the creditors of said George W. Hamilton, and the said merchandise was, notwithstanding said mortgages, subject to lawful seizure under process against the said Hamilton, and it became and was the duty of your petitioner, as a deputy marshall of the United States for the district of Iowa, to take said merchandise under a writ of attachment issued against the property of said Hamilton by the circuit court of the United States in and for the district of Iowa in a cause wherein Marshall Field & Co.
60 were plaintiffs and the said Hamilton was a defendant, and your petitioner took said merchandise, by virtue of said writ, under the authority and duty of his office, but the decision of said supreme court thereon was adverse to your petitioner.

All of which appears by the record of the proceedings in said cause, which are herewith submitted and made a part of this petition.

Wherefore your petitioner prays the allowance of a writ of error returnable unto the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray.

S. S. ETHRIDGE,
By LEHMAN & PARK & N. W. BLISS,
His Attorneys.

Let the writ of error issue as prayed.
September 3rd, 1887.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of the State of Iowa."

60½ On the 14th day of Sept., 1887, there were filed in the office of the clerk of said court a writ of error, bond, and citation,

and the same are hereto attached and transmitted herewith as part of the return of said writ, true and correct copies thereof being retained in the office of said clerk.

And at the same time there was filed in the office of said clerk an assignment of errors, the original of which is hereto attached and made a part of this transcript.

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, being the highest court of law or equity in said State in which a decision in said suit could be had, between Sperry, Watt and Garver, plaintiffs and appellees, and S. S. Etheridge, defendant and appellant, wherein was drawn in question the validity of an authority under the laws of the United States and the decision was against its validity, a manifest error hath happened, to the great damage of the said S. S. Etheridge, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 5th day of September, A. D. 1887.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk U. S. C. C., S. Dist. of Iowa, at Des Moines.

Allowed:
AUSTIN ADAMS,
Chief Justice of the Supreme Court of the State of Iowa.

[Stamped:] Filed Sep. 14, 1887. G. B. Pray, clerk sup. court.

62 Know all men by these presents that we, S. S. Ethridge, as principal, and Chas. W. Rogg, as surety, all of the city of Des Moines, in the State of Iowa, are held and firmly bound unto Sperry, Watt & Garver in the full and just sum of one thousand dollars, to be paid to the said Sperry, Watt & Garver or to their certain attorney, executors, administrators, or assigns; to which payment, well

and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of September, A. D. 1887.

Whereas lately at a session of the supreme court of the State of Iowa, in a suit depending in said court between S. S. Ethridge & Sperry, Watt & Garver, a final judgment was rendered against the said S. S- Ethridge, and the said S. S. Ethridge, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the said judgment in the aforesaid suit, and a citation, directed to the said Sperry, Watt & Garver, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, therefore, the condition of the above obligation is such that if the said S. S. Ethridge shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

S. S. ETHRIDGE, *Principal*,
By LEHMANN & PARK, *Att'ys.*
CHAS. W. ROGG.

Approved by—
AUSTIN ADAMS,
Judge of Supreme Court of Iowa.

STATE OF IOWA, }
County of Polk, } *ss:*

Chas. W. Rogg, being duly and severally sworn, on oath deposes and says, and each for himself says, that he is a resident of the State of Iowa; that he is one of the above-named sureties in the foregoing bond; that he is worth the sum of two thousand dollars over and above all his demands and liabilities, and that he has property liable to execution in the State of Iowa equal to the sum of two thousand dollars.

CHAS. W. ROGG.

Subscribed and sworn to before me by Chas. W. Rogg this 2nd day of September, A. D. 1887.

[Notarial Seal C. W. Dorr, Iowa.]

C. W. DORR,
Notary Public in and for Polk County, Iowa.

[Endorsed:] Supreme court of Io. S. S. Ethridge, pl'ff in error, *vs.* Sperry, Watt & Garver, def't- in error. Appeal bond. Lehmann & Park, attorneys-at-law, Des Moines, Iowa.

[Stamped:] Filed Sep. 14, 1887. G. B. Pray, clerk sup. court.

63 THE UNITED STATES OF AMERICA:

The President of the United States to Sperry, Watt & Garver, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein S. S. Ethridge is plaintiff in error and you are defendant- in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Austin Adams, chief justice of the supreme court of the State of Iowa, this third day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

63½ UNITED STATES MARSHAL'S OFFICE,
FAIRFIELD, IOWA, *Sept. 8th*, 1887.

I hereby appoint C. M. Finch my deputy to serve the annexed citation on Sperry, Watt & Garver.

EDW. CAMPBELL, JR.,
U. S. Marshal.

I certify and return that on the 9th day of September, 1887, at Des Moines, Iowa, I served the annexed citation on Sperry, Watt & Garver by reading it to James Watt, one of the firm of said Sperry, Watt & Garver, and by giving him a true copy thereof.

EDW. CAMPBELL, JR.,
U. S. Marshal,
By CHAS. M. FINCH, *Deputy.*

Fees, $2.60. Paid by Lehmann & Park, att'ys for pl'ff.

[Endorsed:] Ethridge *v.* Sperry, Watt & Garver. Citation.

64 *Assignment of Errors.*

UNITED STATES OF AMERICA:

Supreme Court.

S. S. ETHRIDGE, Plaintiff in Error,
vs.
SPERRY, WATT & GARVER, Defendants in Error.

Now comes the said S. S. Ethridge, plaintiff in error, and for an assignment of errors herein says—

That at the September term, A. D. 1885, of the circuit court of Polk county, in the State of Iowa, in a certain cause therein pending, in which he, the said S. S. Ethridge, was defendant and said Sperry, Watt & Garver were plaintiffs, a judgment was rendered against

him and in favor of said Sperry, Watt & Garver for four hundred and ninety-nine dollars and costs.

And said S. S. Ethridge further represents that at the October term, A. D. 1886, of the supreme court of the State of Iowa, which is the highest court of law and equity in said State in which a decision of said case can be had, said judgment was by said supreme court of the State of Iowa affirmed; all of which will more fully appear by an authenticated transcript of the record of said case herewith filed.

And the said Ethridge says that in rendering said judgment error intervened to his prejudice, as will appear by said record, and that among the errors so intervening are the following:

1. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz:

If the jury find from the evidence that the mortgagor in the chattel mortgages in evidence in this case was left in possession of the stock of goods mortgaged, with no provision for the application of the entire proceeds of sales to the payment of debts
65 secured by the mortgages, but with the privilege, express or implied, of continuing the business of buying and selling as before the making of the mortgages and applying a portion of the proceeds of sale to his own use, then such mortgages are fraudulent and void in law as to creditors.

2. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz:

If the jury find from the evidence that at the time George W. Hamilton executed the mortgages in evidence he was insolvent, and that the said mortgages were made at or near the same time and covered all of the mortgagor's property subject to execution, and that the execution of said papers constituted and were really but one transaction, and that he made the mortgages for the purpose of winding up his business, giving therein preferences as among his creditors, it is in law a general assignment and is void as to all the creditors who do not consent thereto.

3. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz:

If the jury find from the evidence that the plaintiffs herein were not entitled to nor were not in actual possession of the goods levied on by defendant herein, then they cannot recover in this action.

4. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz:

If you find from the evidence that plaintiffs or their agent made an arrangement with the attachment defendant, Hamilton, that he was to have possession and full control of the property mortgaged, and that any part of the same was to be converted to any use
66 other than the discharge of the mortgage indebtedness, then the execution of said mortgage was fraudulent and void as against his creditors.

5. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz:

Chattel mortgages may be fraudulent and void as to creditors of

the mortgagor, even when he had no actual fraudulent intent when executing the same, if their effect is to hinder, delay, and defraud said creditors.

6. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz:

If the said Hamilton, at the time he executed the mortgages to plaintiffs, could not pay his debts as they matured in the regular and ordinary course of business he was insolvent.

7. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz:

If you find from the evidence that the defendant when he took possession of the goods in question was deputy United States marshal and seized such goods by virtue of a writ of attachment issued from the United States circuit court, and in the hands of defendant as such officer for service, and that he still holds said goods or the proceeds thereof as such officer and by virtue of said writ, then you will find for defendant.

8. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz:

If the jury find from the evidence that Hamilton, the mortgagor, was left in possession of the mortgaged property with the privilege, either express or implied, of continuing the business of buying and selling goods and carrying on the business as before the execu-
67 tion of the mortgages to plaintiffs, and of applying the proceeds to his own use, then such transactions are to be considered as evidence properly tending to show that said mortgages are fraudulent.

9. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz:

If you find from the evidence that when the said Hamilton executed to plaintiffs their mortgages they made arrangements with said Hamilton to the effect that he should carry on business as theretofore, and use a part of or all of the proceeds of the sale of the mortgaged property for the support of himself and family, such arrangement is evidence tending to show that the mortgages are fraudulent as to other creditors of said Hamilton.

10. The instructions of the court to the jury, viz:

The issue submitted to you is this: Were the mortgages of plaintiffs executed in good faith and for the purpose of securing a *bona fide* indebtedness due to them from Geo. W. Hamilton at the time or were the same executed by Hamilton and received by the plaintiffs for the purpose of defrauding creditors of Geo. W. Hamilton? And as bearing on this issue the court gives you the following instructions:

11. The instructions of the court to the jury, viz:

The plaintiffs, if they held a valid claim against George W. Hamilton, had a right to demand that the same be secured, and if they in good faith received the mortgages set forth in the petition and that have been introduced in evidence, the same would be valid, even if you should believe that Hamilton at the time was insolvent, and the mortgages would be valid in law though Hamilton was

permitted to remain in possession of the mortgaged property, if the mortgages were properly recorded.

12. The instructions of the court to the jury, viz:

68 It would not be enought to destroy the validity of plaintiffs' mortgages, if you find them valid in other respects, that plaintiffs knew that the mortgagor was insolvent, or that they knew Hamilton, in making said mortgages, intended to give a preference to these plaintiffs over other creditors. Before such transactions could be held invalid as a fraud upon other creditors of said Hamilton you should find from the evidence that the purpose of the mortgagor was to defraud other creditors, and that the plaintiffs took such mortgages with knowledge of the mortgagor's fraudulent intention, and with the purpose, on their part, of assisting the mortgagor in carrying out his fraudulent purpose.

Whereupon he prays that said judgment be reversed.

N. W. BLISS AND
LEHMANN & PARK,
Attorneys for Plaintiff in Error.

[Endorsed:] Supreme court of Iowa. S. S. Ethridge, plaintiff in error, *vs.* Sperry, Watt & Garver, defendant- in error. Assignment of errors. Lehmann & Park, attorneys-at-law, Des Moines, Iowa.
[Stamped:] Filed Sep. 14, 1887. G. B. Pray, clerk sup. court.

69 THE STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of a cause tried and decided in said court between Sperry, Watt & Garver, pl'ffs, and S. S. Ethridge, def't and appellant, to wit, the record wherein said cause was tried and submitted, together with the record of the submission and decision and final judgment rendered in said court, together with a true copy of a petition for a writ of error for the removal of said cause to the Supreme Court of the United States, as full, true, and complete as the same remain on file and of record in my office.

And I further certify that the writ of error, bond, and citation, together with pl'ffs' assignment of errors herein, are attached hereto in original form and transmitted herewith as part of the return to said writ, and true copies of said writ of error, bond, and citation are lodged in my office, and this return is made in obedience to said writ.

In testimony whereof witness my signature and the seal of said court, at Des Moines, Iowa, this 24th day of September, 1887.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clerk Supreme Court of Iowa.

Endorsed on cover: Iowa supreme court. No. 1171. S. S. Etheridge, plaintiff in error, *vs.* Sperry, Watt & Garver. Filed October 12, 1887.

MOTION TO DISMISS.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 799.

S. S. ETHRIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & GARVER.

LEHMANN & PARK AND N. W. BLISS, *for Plaintiff in Error.*
HENRY S. WILCOX, *for Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

MOTION TO DISMISS.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 799.

S. S. ETHRIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & GARVER.

LEHMANN & PARK AND N. W. BLISS, *for Plaintiff in Error.*
HENRY S. WILCOX, *for Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Defendants in error move the court to dismiss the writ of error herein on the ground that the record shows that it was sued out and granted herein by pretended authority of Section 709, Revised Statutes of the United States, and said record and the assignments of error fail to show any error committed that may be examined or corrected under said section or under any other statute of the United States.

HENRY S. WILCOX,
Counsel for Defendant in Error.

Supreme Court, U. S.
FILED,
OCT 4 1889
JAMES H. McKENNEY,
CLERK.

ARGUMENT ON MOTION TO DISMISS APPEAL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 799.

S. S. ETHRIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & GARVER.

LEHMANN & PARK AND N. W. BLISS, *for Plaintiff in Error.*

HENRY S. WILCOX, *for Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 799.

S. S. ETHRIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & GARVER.

LEHMANN & PARK AND N. W. BLISS, *for Plaintiff in Error.*

HENRY S. WILCOX, *for Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ARGUMENT ON MOTION TO DISMISS APPEAL.

STATEMENT.

I.

August 18, 1882, Sperry, Watt & Garver filed their petition in the Circuit Court of Polk county, Iowa, against the plaintiff in error, claiming damage for the conversion of personal property on which they held chattel mortgages.

September 21, 1882, Ethridge answered that he was U. S. Deputy Marshal and took said property by virtue of a general writ of attachment issued against Charles Douglas and George Hamilton in favor of Marshall Field & Co., from the United States Circuit Court, that Sperry, Watt & Garver's mortgages were fraudulent and the property was in fact owned by George W. Hamilton.

October 7th, 1884, Ethridge petitioned to remove the cause to the Circuit court of the United States, which was overruled.

September 22, 1885, Ethridge moved to substitute Marshall Field & Co. in his stead which was overruled.

September 29, 1885, a jury trial was had resulting in a verdict for Sperry, Watt & Garver on which judgment was entered.

March 5th, 1886, Ethridge appealed to the Iowa Supreme Court.

October 25th, 1886, the judgment was affirmed.

September 14th, 1887, Ethridge petitioned for a writ of error un-

der Section 709, Revised Statutes of the United States which was granted.

II.

The errors assigned relate only to the refusal by the Circuit Court of Polk county to give certain instructions asked by said plaintiff in error as to the validity of chattel mortgages and the giving of certain other instructions of the same nature. Were the instructions asked properly refused, and the instructions given correct expositions of the law? These are the only questions raised. Are these reviewable under Section 709 of the U. S. Revised Statutes is the solitary inquiry presented by this motion. The instructions referred to relate wholly to the common law of Iowa. They have no reference to any Federal statute. It is not claimed that these declarations of Iowa laws are repugnant to any constitution, treaties or laws of the United States. Such a question is nowhere made in the record either in the Polk County Circuit Court or in the Supreme Court of Iowa. But it is claimed that Ethridge being Deputy Marshal and having a writ of general attachment against Douglas and Hamilton, had a right under the statutes of the United States to levy on the property on which defendants in error held mortgages because said mortgages were fraudulent and void. Defendants in error do not question his authority, if the mortgages were void, but contend that the mortgages were not void. Here then is the sole contention. It is a mixed question of law and fact and relates entirely to the laws of Iowa in the matter of the transfer and disposition of personal property. It has no reference to the United States Constitution, treaties or statutes or any immunity, privilege or authority claimed thereunder. A marshal serving a writ of general attachment must determine at his peril whether the property under the laws of the state relating to its transfer and disposition is in fact the property of the attachment defendant. If it is not his writ affords him no protection. See Buck vs. Colbath, 3 Wall. 334; Shoap vs. Doyle, 102 U. S. 686. Theoretically there is but one common law in the whole nation, however differently the courts in different portions may construe it, and there is surely but one in Iowa. In its interpretations judges may not always agree. In contests over property the court acquiring jurisdiction determines the rights of parties under the common law. There is no Federal statute that authorizes this court to review an alleged error of a state court in declaring the common law between citizens of the same state, even though one of them may have been a deputy marshal when the question arose.

Such being the case and the record disclosing no federal question which this court can consider, the writ of error should be dismissed.

Respectfully submitted,

HENRY S. WILCOX,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1171

S. S. ETHRIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & GARVER.

IN ERROR TO THE SUPREME COURT OF IOWA.

Argument Against Motion to Dismiss Appeal.

der Section 709, Revised Statutes of the United States which was granted.

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Such being the case and the record disclosing no federal question which this court can consider, the writ of error should be dismissed.

Respectfully submitted,

HENRY S. WILCOX,
Counsel for Defendant in Error.

Supreme Court U.S.
FILED
OCT 21 1889
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1171.

S. S. ETHRIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & GARVER.

IN ERROR TO THE SUPREME COURT OF IOWA.

Argument Against Motion to Dismiss Appeal.

P. C. KENYON, LAW BRIEF PUBLISHER, DES MOINES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

S. S. ETHRIDGE, *Plaintiff in Error,*
vs.
SPERRY, WATT & GARVER,
Defendants in Error.
} *In Error to the Supreme Court of the State of Iowa.*

IN ERROR TO THE SUPREME COURT OF IOWA.

F. W. LEHMANN AND N. W. BLISS, *for Plaintiff in Error.*
HENRY S. WILCOX, *for the Defendant in Error.*

ARGUMENT FOR PLAINTIFF IN ERROR AGAINST THE MOTION TO DISMISS THE APPEAL.

Sperry, Watt & Garver sued Ethridge, the plaintiff in error, in the state court to recover the value of some merchandise which had been taken by him, and upon which they held chattel mortgages.

Ethridge set up by way of defense that he was at the time a deputy marshal of the United States in and for the southern district of Iowa; that he levied upon the property in controversy under a writ of attachment issued out of the office of the clerk of the circuit court of the United States for the southern district of Iowa in a suit there pending of Marshall, Field & Co., plaintiff, *vs.* Charles Douglas and Geo. W. Hamilton, defendants; that he levied upon the property in question as the

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

S. S. ETHRIDGE, *Plaintiff in Error,*
vs.
SPERRY, WATT & GARVER,
Defendants in Error.

In Error to the Supreme Court of the State of Iowa.

IN ERROR TO THE SUPREME COURT OF IOWA.

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property of Geo. W. Hamilton, and that it was in fact his property, because the chattel mortgages from Hamilton under which Sperry, Watt & Garver claimed were fraudulent and void as to the creditors of Hamilton.

Evidence was introduced in support of this defense, but the judgment of the state court was adverse to Ethridge.

The merits of the case are not involved by the pending motion, and we shall not therefore consider them.

That Ethridge was deputy United States marshal; that he had such a writ as he claimed to have, and that he took the property under the writ as the property of Geo. W. Hamilton, was not in controversy. The controverted question, the bone of contention in the case, was that involving the validity of the mortgages to Sperry, Watt & Garver. If these were valid, then the property belonged, to the extent of their claims, to Sperry, Watt & Garver. If these were invalid, then the property belonged to Hamilton, and was rightfully levied upon by the marshal.

Because the validity or invalidity of the authority of the United States, which Ethridge claimed to exercise, was easily determinable, indeed was obvious, the moment the validity or invalidity of the mortgages was determined, counsel for defendants in error contends that such authority was in nowise drawn into question in the case.

We quote from page 2 of the brief of counsel:

> But it is claimed that Ethridge being deputy marshal, and having a writ of general attachment against Douglas and Hamilton, had a right under the statutes of the United States to levy on the property on which defendants in error held mortgages because said mortgages were fraudulent and void. Defendants in error do not question his authority, if the mortgages were void, but contend that the mortgages were not void. Here then is the sole contention. It is a mixed question of law and fact, and relates entirely to the laws of Iowa in the matter of the transfer and disposition of personal property. It has no reference to the United States constitution, treaties or statutes or any immunity, privilege or authority claimed thereunder.

If this position is well taken, then this court has no power to review the judgment of a state court where a claim under federal law or authority is denied upon a finding of fact.

In *Lytle vs Arkansas*, 22 How., 193, the decision of the state court was adverse to the validity of an entry of land which had been allowed by the proper officers of the United States. The court said:

> The cause was fully heard on its merits below and the claim of Cloyes rejected on the ground that he obtained his entry by fraud in fact and by fraud in law. and the question is, can we take jurisdiction and reform this general decree? *It rejected the title of Cloyes*, and in our opinion it is not material whether the validity of the title was decreed in the supreme court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree.

Martin vs. Hunter's Lessee, 1 Wheat., 304, 357, is in principle precisely like the case at bar. The question there was whether a title was protected by treaty. It was urged that the validity of the title independent of the treaty could not be considered by this court, and that the only question subject to review was the correctness of the construction put by the state court upon the treaty itself. But the court said:

> If this be the true construction of the section, (twenty-fifth of the judiciary act), it will be wholly inadequate for the purposes which it professes to have in view and may be evaded at pleasure; but we see no reason for adopting this narrow construction, and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty and not the mere abstract construction of the treaty itself upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what the title is and whether it has a legal validity. From the very necessity of the case there must be a preliminary inquiry into the existence and structure of the title before the court can construe the treaty in reference to that title.

If the court below should decide that the title was bad and therefore not protected by the treaty, must not this court have a power to decide the title to be good and therefore protected by the treaty? Is not the treaty in both instances equally construed and the title of the party in reference to the treaty equally ascertained and decided. Nor does the clause relied on in the objection impugn this construction. It requires that the error upon which the appellate court is to decide, shall appear on the face of the record and immediately respect the questions before mentioned in the section.

One of the questions is as to the construction of a treaty upon a title specially set up by a party and every error that immediately respects that question must of course be within the cognizance of the court. The title set up in this case is apparent upon the face of the record and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examined or the case could never be presented to the court. * * * * In *Smith vs. The State of Maryland*, 6 Cranch., 286, precisely the same objection was taken by counsel and overruled by the unanimous opinion of the court. That case was in some respects stronger than the present, for the court below decided expressly that the party had no title and therefore the treaty could not operate upon it. This court entered into an examination of that question and being of the same opinion, affirmed the judgment. There cannot then be an authority which could more completely govern the present question.

In *Smith vs Maryland*, 6 Cranch., 286, the court answering an argument like that made by counsel here said:

This argument proves nothing more than that the whole difficulty in this case depends upon that part of it which involves the construction of certain state laws, and that the operation and effect of the treaty, which constitutes the residue of the case, is obvious so soon as that construction is settled. But still the question recurs, is this a case where the construction of any clause in a treaty was drawn in question in the state court, and where the decision was against the title set up under such treaty? The only title asserted by the defendants in error, to the land in dispute, is founded upon an alleged confiscation of them by the state of Maryland, and a conveyance to them of the right thus acquired by the state. The title set up by the plaintiffs in error, for Ann Ottey, and the only one which could possibly resist that claimed by the grantees of the state, is under the treaty of peace, the sixth article of which protects her rights, provided the confiscation, by the laws of the state, was not complete prior to the treaty. The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the sixth article of that treaty; and, in order to arrive at a correct result

in the decision of that point, it became necessary in the state court, and will be necessary in this, to inquire whether the confiscation declared by the state laws was final and complete at the time the treaty was made or not? The construction of those laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty; and it is perfectly immaterial to the point of jurisdiction, that the first part of the way is the most difficult to explore.

Of the many other cases that might be cited, we content ourselves with calling attention to that of *Buck vs. Colbath*, 3 Wall, 334. That case like this, was an action of trespass by Colbath against Buck for taking goods. Buck pleaded in defense his office of marshal and that he had taken the goods under a writ of attachment against certain persons named, but he did not allege that they were the goods of the defendants in the writ. On the trial Colbath made proof of his ownership of the goods while Buck proved only that he was marshal and that he held the goods under the writ of attachment.

The judgment of the state court was adverse to Buck and he brought the case here for review. On the merits, the decision here was against him, but his right to bring the case here for review was distinctly affirmed. The court said:

There seems to be no reason to doubt that the case comes within the provisions of the twenty-fifth section of the judiciary act. The defendant claimed the protection of "an authority exercised under the United States," and the decision was against the protection thus claimed; or, in other words, against the validity of that authority, as a protection to him in that action. Whether the authority which he thus set up was valid to protect him, is a question for this court to decide finally, and is properly before us under the writ of error to the supreme court of Minnesota

The case at bar differs from *Buck vs. Colbath* only in this, that in the case at bar the marshal distinctly alleges that the property levied upon by him belonged to one of the defendants named in the writ of attachment. If this allegation is sustained, then not only has this court jurisdiction of the case, but will, upon the merits, reverse the judgment of the state court.

Counsel for defendants in error contends that the decision of the state court upon the right of property is final, and this having been adverse to the marshal, the case is at an end and not open to re-examination here. If this is so, then there was no jurisdiction in *Buck vs. Colbath*, because that the title to the property there in controversy was in Colbath was not only decided by the state tribunal, but it was not denied by Buck.

We deem it unnecessary to say more.

F. W. LEHMANN,
N. W. BLISS,
of Counsel for Plaintiff in Error.

FILED.
DEC 26 1890
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

S. S. ETHERIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & GARVER, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The defendants in error, Sperry, Watt & Garver, brought this suit on the law side of the District Court of Polk county, Iowa, to recover from the plaintiff in error, S. S. Etheridge, the value of some merchandise, in which they claimed an interest, and which they alleged he had unlawfully taken and appropriated to his own use.

Etheridge admitted taking the property, but averred that he was at the time a Deputy Marshal of the United States for the Southern District of Iowa; that the merchandise in question was the property of one Geo. W. Hamilton, and had been taken under a writ of attachment issued out of the office of the clerk of the Circuit Court of the United States for the Southern District of Iowa, in a suit wherein Marshall Field & Co. were plaintiffs, and Geo. W. Hamilton and one Charles Douglass were defendants.

Charles Douglass and Geo. W. Hamilton were partners doing business as merchants in the town of Knoxville, Iowa. Hamilton bought the interest of Douglass in the year 1882 and succeeded to the business of the firm.

On June 29, 1882, Hamilton being then insolvent, executed and delivered a mortgage upon his stock of merchandise to Perry, Cook and Tower, to secure an indebtedness due to them. This mortgage was filed for record July 4, 1882.

On July 4, 1882, Hamilton executed a second mortgage on his stock of merchandise to Sperry, Watt & Garver to secure an indebtedness to them of $346.62 which mortgage was filed for record on the same day.

On July 5, 1882, Hamilton executed another mortgage to Sperry, Watt & Garver on the same property to secure an indebtedness of $89.54, which mortgage was filed for record on the same day.

On July 6, 1882, other creditors pressing him for security, Hamilton executed another chattel mortgage, to secure a large number of creditors in the order in which they are listed in the mortgage. This mortgage was made to O. P. Wright, as trustee; Marshall Field & Co. were named as among the creditors secured, but they never assented to the mortgage.

All these mortgages covered the same property, it being the merchandise, fixtures, etc., constituting Hamilton's stock in trade. Hamilton had no other property in Iowa subject to execution, and he had no other property anywhere, save an interest in his father's estate in Illinois, from which he realized $140. His assets proved to be entirely insufficient for the payment of his debts.

The controversy in this case is with Sperry, Watt & Garver alone.

It will be seen by reference to the mortgages (pp. 6 and 7 of the record), that while they authorized the mortgagees to take possession at any time, they contemplated that the mortgagor should continue in possession.

Furthermore, Hamilton testified, and as to this there is no conflict, that when he made the several mortgages above

referred to, it was agreed with the mortgagees that he should continue in possession, and go on selling goods in the ordinary way of trade. The money he received from the sales he was to use in buying other goods as he saw proper in carrying on the business, filling up the stock and all that, take out whatever was needed for the support of himself and family, and the money not needed for these purposes was to be applied to the payment of the debts. It was expected, he says, that he would be able to pay out and that he was to carry on the business the same as before. He was to have all the time he wanted and they were not to push him, and he was to carry on his business the same as before, so long as he desired and did what was right. In pursuance of this agreement, Hamilton continued in possession of the property and continued the business, checking out money for whatever he wanted. There was no objection to anything he did by the mortgagees, and the arrangement made with them was not interfered with until August 8, 1882; when the marshal levied his writ of attachment, Hamilton then being in possession of the property in pursuance of the agreement above set out.

Notwithstanding the facts above recited, all of which were pertinent under the pleadings in the case, the District Court held the mortgages to Sperry, Watt & Garver to be valid and rendered judgment against Etheridge for the value of the goods taken under the writ of attachment. The action of the District Court being sustained by the Supreme Court of the State, the case is brought to this court on writ of error.

Assignment of Errors.

There is error in the record as follows, viz.:

1. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz.:

If the jury find from the evidence that the mortgagor in the chattel mortgages in evidence in this case was left in possession of the stock of goods mortgaged, with no provision for the application of the entire proceeds of sales to the pay-

ment of debts secured by the mortgages, but with the privilege, express or implied, of continuing the business of buying and selling as before the making of the mortgages, and applying a portion of the proceeds of sale to his own use, then such mortgages are fraudulent and void in law as to creditors.

2. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz.:

If the jury find from the evidence that at the time George W. Hamilton executed the mortgages in evidence he was insolvent, and that the said mortgages were made at or near the same time and covered all of the mortgagor's property subject to execution, and that the execution of said papers constituted and were really but one transaction, and that he made the mortgages for the purpose of winding up his business, giving therein preferences as among his creditors, it is in law a general assignment and is void as to all the creditors who do not consent thereto.

3. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz.:

If the jury find from the evidence that the plaintiffs herein were not entitled to or were not in actual possession of the goods levied on by defendant herein, then they can not recover in this action.

4. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz.:

If you find from the evidence that plaintiffs or their agent made an arrangement with the attachment defendant, Hamilton; that he was to have possession and full control of the property mortgaged, and that any part of the same was to be converted to any use other than the discharge of the mortgage indebtedness, then the execution of said mortgage was fraudulent and void as against his creditors.

5. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz.:

Chattel mortgages may be fraudulent and void as to creditors of the mortgagor, even when he had no actual fraudu-

lent intent when executing the same, if their effect is to hinder, delay and defraud said creditors.

6. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz.:

If the said Hamilton, at the time he executed the mortgages to plaintiffs, could not pay his debts as they matured in the regular and ordinary course of business he was insolvent.

7. The refusal of the court trying said cause to charge the jury as requested by the plaintiff in error, viz.:

If you find from the evidence that the defendant, when he took possession of the goods in question was Deputy United States Marshal, and seized such goods by virtue of a writ of attachment issued from the United States Circuit Court, and in the hands of defendant as such officer for service, and that he still holds said goods or the proceeds thereof as such officer and by virtue of said writ, then you will find for defendant.

8. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz.:

If the jury find from the evidence that Hamilton, the mortgagor, was left in possession of the mortgaged property, with the privilege, either express or implied, of continuing the business of buying and selling goods and carrying on the business as before the execution of the mortgages to plaintiffs, and of applying the proceeds to his own use, then such transactions are to be considered as evidence properly tending to show that said mortgages are fraudulent.

9. The refusal of the court trying said cause to charge the jury as requested by plaintiff in error, viz.:

If you find from the evidence that when the said Hamilton executed to plaintiffs their mortgages they made arrangements with said Hamilton to the effect that he should carry on business as theretofore, and use a part of or all of the proceeds of the sale of the mortgaged property for the support of himself and family, such arrangement is evidence tending to show that the mortgages are fraudulent as to other creditors of said Hamilton.

10. The instruction of the court to the jury, viz.:

The issue submitted to you is this: Were the mortgages of plaintiffs executed in good faith and for the purpose of securing a *bona fide* indebtedness due to them from Geo. W. Hamilton at the time, or were the same executed by Hamilton and received by the plaintiffs for the purpose of defrauding creditors of Geo. W. Hamilton? And as bearing on this issue the court gives you the following instructions:

11. The instruction of the court to the jury, viz:

The plaintiffs, if they held a valid claim against Geo. W. Hamilton, had a right to demand that the same be secured, and if they in good faith received the mortgages set forth in the petition, and that have been introduced in evidence, the same would be valid, even if you should believe that Hamilton at the time was insolvent, and the mortgages would be valid in law, though Hamilton was permitted to remain in possession of the mortgaged property, if the mortgages were properly recorded.

12. The instructions of the court to the jury, viz.:

It would not be enough to destroy the validity of plaintiff's mortgages, if you find them valid in other respects; that plaintiffs knew that the mortgagor was insolvent, or that they knew Hamilton, in making said mortgages, intended to give a preference to these plaintiffs over other creditors. Before such transactions could be held invalid as a fraud upon other creditors of said Hamilton, you should find from the evidence that the purpose of the mortgagor was to defraud other creditors, and that the plaintiffs took such mortgages with knowledge of the mortgagor's fraudulent intention, and with the purpose, on their part, of assisting the mortgagor in carrying out his fraudulent purpose.

13. In the judgment of the court, holding said mortgages to be valid.

The questions raised by these assignments of error all relate to the validity of the mortgages. The propositions essential to the maintenance of the case by the plaintiff in error are:

1. That this court has jurisdiction of the controversy, because a Federal question is involved.

2. That the mortgages in question are invalid under the rule in *Robinson* v. *Elliott*

3. That the rule of *Robinson* v. *Elliott*, should govern the case, rather than the rule declared by the Supreme Court of Iowa

JURISDICTION.

That this court has jurisdiction of such a case is decisively established by *Buck* v. *Colbath*, 3 Wall. 334. In so far as the question of jurisdiction is concerned, the cases are parallel. In the case cited, it is said:

"There seems to be no reason to doubt that the case comes within the provisions of the 25th section of the judiciary act. The defendant claimed the protection of 'an authority exercised under the United States,' and the decision was against the validity of that authority, as a protection to him in that action. Whether the authority which he thus set up was valid to protect him, is a question for this court to decide finally, and is properly before us under the writ of error to the Supreme Court of Minnesota."

In the case at bar, Etheridge set up not only his official character and the fact that the property was taken under the writ of attachment, but he pleads specifically that the mortgages to Sperry, Watt & Garver were fraudulent and void as to creditors, and that the property in controversy was, at the time of levying the writ of attachment, the property of George W. Hamilton.

The objection made to the jurisdiction of this court rests upon the ground that the authority under which the marshal was acting was not disputed. It was said in support of the motion to dismiss for want of jurisdiction, that "the defendants in error do not question his (the marshal's) authority, if the mortgages were void, but contend that the mortgages were not void." This affects the merits of the case, rather than the jurisdiction of the court. It assumes that the authority of the marshal was wrongfully exercised, and infers that, this being so, the court can not take cogni-

zance of the case. But it is apparent that there was drawn in question the validity of an authority under the laws of the United States, and that the decision of the State court was against its validity.

The ground upon which the authority was adjudged to be invalid is immaterial.

Lytle v. *Arkansas*, 22 How. 193.

It is contended, however, that the validity of the mortgages is a question which this court can not consider as an independent one, and that this, not presenting in itself a federal question, having been decided adversely to the plaintiff in error by the State court, there is an end of the case.

Martin v. *Hunter's Lessee*, 1 Wheat. 304, 357, is in principle precisely like the case at bar. The question there was whether a title was protected by treaty. It was urged that the validity of the title independent of the treaty could not be considered by this court, and that the only question subject to review was the correctness of the construction put by the State court upon the treaty itself. But the court said:

"If this be the true construction of the section (twenty-fifth of the Judiciary Act) it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure; but we see no reason for adopting this narrow construction, and there are the strongest reasons against it, founded upon the words as well as the intent of the Legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty and the decision is against the title set up by the party. It is, therefore, the decision against the title, set up with reference to the treaty, and not the mere abstract construction of the treaty itself upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what the title is and whether it has a legal validity?

From the very necessity of the case there must be a preliminary inquiry into the existence and structure of the title before the court can construe the treaty in reference to that title.

If the court below should decide that the title was bad, and therefore not protected by the treaty, must not this court have the power to decide the title to be good, and therefore protected by the treaty? Is not the treaty in both instances equally construed, and the title of the party in reference to the treaty equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires that the error upon which the Appellate Court is to decide shall appear on the face of the record and immediately respect the questions before mentioned in the section.

One of the questions is as to the construction of a treaty upon a title specially set up by a party and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparent upon the face of the record and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examined or the case could never be presented to the court. * * * In *Smith* v. *The State of Maryland*, 6 Cranch, 286, precisely the same objection was taken by counsel and overruled by the unanimous opinion of the court. That case was in some respects stronger than the present, for the court below decided expressly that the party had no title and therefore the treaty could not operate upon it. This court entered into an examination of that question and being of the same opinion, affirmed the judgment. There can not then be an authority which could more completely govern the present question.

In *Smith* v. *Maryland*, 6 Cranch, 286, the court, answering an argument like that made by counsel here, said:

"This argument proves nothing more than that the whole difficulty in this case depends upon that part of it which involves the construction of certain State laws, and

that the operation and effect of the treaty, which constitutes the residue of the case, is obvious, so soon as that construction is settled. But still the question recurs, is this a case where the construction of any clause in a treaty was drawn in question in the State court, and where the decision was against the title set up under such treaty? The only title asserted by the defendant in error to the land in dispute, is founded upon an alleged confiscation of them by the State of Maryland, and a conveyance to them of the right thus acquired by the State. The title set up by the plaintiffs in error, for Ann Ottey, and the only one which could possibly resist that claimed by the grantees of the State is under the treaty of peace, the sixth article of which protects her rights, provided the confiscation by the laws of tne State, was not complete prior to the treaty. The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the sixth article of that treaty; and in order to arrive at a correct result in the decision of that point, it became necessary in the State court, and will be necessary in this, to inquire whether the confiscation declared by the State laws was final and complete at the time the treaty was made or not. The construction of those laws, then, is only a step in the cause leading to the contruction and meaning of this article of the treaty; and it is perfectly immaterial to the point of jurisdiction that the first part of the way is the most difficult to explore."

THE MERITS OF THE CASE.

Upon the admitted facts of the case and tested by the rule laid down in *Robinson* v. *Elliott*, 22 Wall. 513, the mortgages in question were clearly fraudulent as to creditors. The only difference in the cases is, that in *Robinson* v. *Elliott*, the fraudulent agreement appeared upon the face of the instrument, while in the case at bar it rested in parol.

This difference, however, is unsubstantial, so far as concerns the character of the transaction. In *Southard* v. *Benner*, 72 N. Y., 424, it was said:

"Whether the agreement is in or out of the mortgage,

whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement can not take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instruments of suretyship, instead of by parol or in some other way."

See also,

Collins v. *Meyers*, 16 Ohio, 547.
Orton v. *Orton*, 7 Oregon, 478.

The rulings of the State court holding the mortgages valid were not based upon any attempted distinction between the case at bar and the case of *Robinson* v. *Elliott*.

It is too well settled as a principle of law to need either authority or argument to sustain it, that an agreement fraudulent in fact will not be held valid because the elements constituting the fraud are not committed to writing. Where third parties are concerned the court is not limited to the written evidence of what the parties have done or intended, but will discover and lay bare the entire transaction.

The facts of this case make it exactly parallel with that of *Means* v. *Dowd*, 128 U. S. 273. Hamilton was insolvent. His assets were not nearly sufficient to pay his debts. By mortgages executed June 29, July 4, 5 and 6, 1882, he incumbered all his property in pretended trust for creditors, specifying the order in which they were to be paid. He was to continue in possession and carry on the business so long as he desired, applying the proceeds of sales at his own discretion to keeping up his stock and providing for his business and personal expenses, and to use only what he did not need for these purposes to the payment of his debts. The transaction is so like that described in *Means* v. *Dowd*, that every word of reprobation there employed is applicable here. In that case it was said by Mr. Justice Miller:

"All experience has shown how very common it is for failing or insolvent debtors, who have any considerable means on hand, and especially in cases where a mercantile business of considerable value is still going on, to delude themselves with the idea that if they can get time they can pay their debts; that if their creditors will delay until they can make such arrangements as they believe themselves capable of, they will be able to pay everybody, and even to save a very considerable surplus out of their business. This delusion leads them to undertake to obtain this delay by means which the law does not sanction. If the creditors refuse to extend time on their obligations, and thus give them the delay which they deem necessary, or if they fear to expose their condition to their creditors, they adopt, in many instances, the principle of making an absolute sale to certain friends, who will settle up their affairs and return to them any surplus, or they make assignments or deeds of trust, conveying the title to all their property to some trustee or assignee and vesting it in them, thus opposing an obstruction to the efforts of creditors at law to collect the amounts which may be due to them. In this manner they frequently take the law into their own hands, and attempt to secure that delay which can only be obtained by the consent of the creditors, or by such a conveyance as leaves the creditors, in no worse condition than they were before.

"It has always been held that whatever transfer of this character that is, of the title to property by a failing or insolvent debtor, may be valid, any instrument which secures to the assignor an interest in or an unlimited control over the property conveyed, and which has the effect of hindering or delaying creditors, is void as being a fraud upon those creditors.

"A very similar case to the one before us was that of *Griswold* v. *Sheldon*, 4 N. Y. (4 Comst.), 580, in which the court decided that the mortgage, which, besides permitting the mortgagor, by its terms, to retain possession of the goods, and on its face conferred on him the power to sell

and dispose of them as his own, was, therefore, fraudulent and void in law as to creditors.

"Another decision of like character was made in *Nicholson* v. *Leavitt*, 6 N. Y. (2 Seld.), 510, the head-note of which correctly expresses what was decided in the following words: 'An assignment by insolvent debtors of their property to trustees for the benefit of their creditors, authorizing the trustees to sell the assigned property *upon credit*, is fraudulent and void as against the creditors of the assignors.'

"This is founded upon the ground that such a provision has the effect of hindering and delaying creditors.

"A very instructive case, and very like the one before us, is that of *Davis* v. *Ransom*, 18 Illinois, 396. A chattel mortgage of a stock of goods has been made, reciting the indebtedness of the mortgagor, but with an agreement that he should keep possession of the goods and sell them in the usual course of trade. Out of the proceeds he was to pay certain preferred creditors, dividing the remainder *pro rata* among the others with the right in the mortgagee to take possession of the property under certain contingencies. This mortgage was held void upon the principles already cited.

"To the same effect is the case of *Bank* v. *Hunt*, 11 Wall. 391, which cites with approval the case of *Griswold* v. *Sheldon*, *supra*.

"But this whole subject has been so frequently discussed in the American courts that it would be an immense labor to go very extensively into the authorities. The prevailing doctrine, however, is unquestionable, that which we have stated, and its fundamental essence is, that an insolvent debtor, making an assignment for the benefit of his creditors can not reserve to himself any beneficial interest in the property assigned, or interpose any delay, or make provisions which would hinder and delay creditors from their lawful modes of prosecuting their claims."

The fraudulent agreement in this case was made by the mortgagor with the agent of the mortgagees at the time the mortgages were executed. The mortgagees assented to the

agreement and performed its terms on their part. For more than a month they permitted the mortgagor to remain in possession and dispose of the property. And when this arrangement, which, if valid, subjected the general creditors of Hamilton, to his will or convenience as to the time of paying their claims, was finally interrupted, the interruption came not from the mortgagees, but from the marshal.

The result in the case reached by the State court is due to the fact simply that that tribunal does not recognize or apply the rule of *Robinson* v. *Elliott*. It does not recognize an agreement between mortgagor and mortgagee such as is shown to have been made in this case, as fraudulent in law. It goes no farther than to permit the agreement to be proven as a fact from which, taken in connection with other facts, the jury may infer actual fraud. But such an agreement in itself is not regarded either as fraudulent in law or as warranting an inference of fraud in fact. Because there was a *bona fide* indebtedness to the mortgagees and no specific intent on their part to hinder, delay or defraud other creditors, the transaction shown is held to be a valid one.

An examination of the instructions given and refused by the District Court, whose action in this respect was fully sustained by the Supreme Court, will show this. It is indeed not a matter of dispute. The mortgage despite the agreement is valid under the rule of the Supreme Court of Iowa.

The marshal as an officer of the Federal Court was responsible to that court for the due and proper exercise of his official functions. In *Buck* v. *Colbath* cited above, the court speaking of the duty of the marshal, with respect to writs like that here involved, say:

"In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. First, in ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed; secondly, that it is property which, by law, is subject to be

taken under the writ, and thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else."

Had the marshal refused to levy the writ he would have been responsible for his action to the plaintiff in the attachment suit, and had his conduct been called into question in that way his liability would have been determined by the Federal court, but whether challenged by the plaintiff, the defendant or some third party, and whether called to account in a State or in a Federal court, the rule by which his duty was to be determined, must, in each case, be the same.

The question then involved is this, whether the court will determine the duty of the marshal in the light of its own decisions or will look to those of the Supreme Court of Iowa, or in other words, is the question one of local or of general law.

If it were simply a matter of statutory construction it may be that the rule of the State court must govern. The statutes of Iowa relating to chattel mortgages are as follows:

"Section 1923. No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides."

Sections 1924 to 1926 relate exclusively to the manner of recording. Section 1927 provides:

"The recorder shall, as soon as practicable, record such instrument, and enter in his entry book, in its proper place, the page and book where the record may be found."

Of these statutory provisions no more can be said than was said by this court in Robinson v. Elliott, concerning the statute of Indiana, viz.:

"Prior to the incorporation of these provisions in the statute, it was necessary to the validity of chattel mortgages in Indiana that there should be a manual delivery of the mortgaged property to the mortgagee, who should continue to hold the same in his possession. These provisions changed the law in this particular, and permitted the retention of the possession of personal property by the mortgagor in a chattel mortgage given as a security for the payment of debts. And there can be no question that in Indiana a mortgage, which simply allows the mortgagor to retain the possession and use of the property until breach of the condition is, when duly recorded, *prima facie* valid. But it is insisted that the effect of these provisions is also to make a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, *prima facie* valid, and that the court can not, as a matter of law, pronounce it fraudulent. This, we think, is going beyond what the Legislature intended. If registration was intended, as we think it was, as a substitute for delivery of possession, it was not meant to be a protection for all the other stipulations contained in a mortgage. If so, it could be used as a cover for any fraudulent transaction, which would have to be treated, on the theory advanced, as valid, until the contrary was shown."

See, also, *Means* v. *Dowd*, 128 U. S. 285.

Certainly the terms of the Iowa statute do not, any more than the terms of the Indiana statute, make registrations a protection for all the other stipulations contained in the mortgage.

Neither has the statute of Iowa been so extended by judicial contruction as to give it that effect.

Torbert v. *Hayden*, 11 Iowa, 435, is the leading case in that State on this subject. In that case, the court held very properly that the mere retention of possession by the mortgagor when the mortgage is registered, is not fraudulent, because expressly authorized by statute, registration being made the legal equivalent of possession by the mortgagee. The manner of possession it is said, however, is a proper subject of inquiry. "If it was accompanied with the power of disposition, or used in any way inconsistent with the object of the security of the rights of the mortgagee, these would be badges of fraud, not absolute, but *prima facie*, requiring explanation."

They hold that whether possession with the right of the mortgagor to deal with the property as his own, is fraudulent, is a question of intent and determinable as a matter of fact, and not as a matter of law.

It is to be observed, however, that the statute is not construed as authorizing more than possession by the mortgagor with power of use and sale. The statute is not held to extend to the question of application of the proceeds of sale or use. The transaction there involved was held in fact to be beneficial to the creditors and the inference of legal fraud drawn by the lower court was therefore held to be unwarranted.

In *Hughes* v. *Cory*, 20 Iowa, 399, the court held that the right of reasonable use by the mortgagor followed from the statutory right of possession, but they held nothing further as a matter of statutory construction. The agreement relied upon to defeat the mortgage is considered at length and held not to be fraudulent in its effect and operation as to other creditors.

Other cases decided by the Supreme Court of Iowa are to like effect. The statute is not in any case held to determine what is a reasonable or rightful power of use by the mortgagor, but this is in all the cases treated as a question of fact to be determined according to the merits of the particu-

lar case. As a matter of statutory construction the Iowa cases are in perfect harmony with *Robertson* v. *Elliott*. The conflict does not arise until that point is passed. In the present case entire control of the property mortgaged was reserved to the mortgagor. The several mortgages taken together and in connection with the parol agreements operated as a general assignment for the benefit of creditors, with preferences and with the right reserved to the debtor to administer the trust at his own discretion. The debtor had under the arrangement the right to maintain his store as a going concern, to provide as he saw fit for keeping it up and for his own support and out of the balance of the proceeds of his business pay creditors in the order he himself had established. Had he attempted to do this directly and by a single instrument to that effect the transaction would be void under the statutes of Iowa relating to assignments for the benefit of creditors. In *Means* v. *Dowd*, this court say:

"It is difficult to imagine a scheme more artfully devised between insolvent debtors and their preferred creditors to enable the former to continue in business, at the same time withdrawing their property used in its prosecution from the claims of other creditors, which might be asserted according to the usual forms of law. So long as these debtors were able to pay the interest and keep the trustees satisfied that they were not going to lose anything by the delay, the business could go on and the property of the insolvent firm be safe from execution and attachment."

So, too, we understand the case of *Robinson* v. *Elliott* to hold that the mortgage in that case was fraudulent as a matter of law, not because possession was retained by the mortgagor, not because there was reserved to him a reasonable right of use, but because the mortgage went beyond this, and in its operation and effect was unnecessarily for the benefit of the debtor and prejudicial to other creditors. The court say:

"But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so,

and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages, with somewhat analogous provisions to the one under consideration. The cases can not be reconciled by any process of reasoning, or on any principle of law. As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. It is not difficult to see that the mere retention and use of personal property until default, is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. The former is permitted by the laws of Indiana, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor. We are not prepared to say that a mortgage under the Indiana statute would not be sustained, which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors. But there are features engrafted on this mortgage which are not only to the prejudice of creditors but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail,

and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing and their payment at maturity, it is based on the idea that they may be indefinitely prolonged."

The stipulations in this case that the debtor should use the proceeds of sales for his own support and to keep up his business, and leaving the exercise of this power absolutely to the discretion of the debtor, are not beneficial to the mortgagee and they are necessarily detrimental to the general creditors.

The case of *Bank* v. *Bates*, 120 U. S. 556, decides nothing adverse to this. *Robinson* v. *Elliott* is there cited as an authority for the decision rendered. As the case did not turn on this point, the facts relating to it are not set forth further than that it was claimed that as to the mortgage assailed, the debtor was to continue in possession and prosecute the business in the ordinary mode.

In the case at bar the debtor was wholly insolvent. But his property, while insufficient to pay all his debts, was more than enough to pay the indebtedness to Sperry, Watt & Garver, and that secured by the prior mortgage. The arrangement made with the mortgagor removed the surplus of property over and above the amount requisite to pay the secured debts from the reach of creditors, so far as it was in the power of the parties to do so. An inevitable consequence of the arrangement was that property otherwise liable for debts would be consumed by the debtor or converted to his own use. There was a double purpose in the agreement, so far as the debtor was concerned, viz., to secure the creditors who were pressing him, and to protect himself against those who were not. We insist that the operation and effect upon the rights of general creditors of such an arrangement as that which is herein shown is not in any wise dependent upon the construction of the Iowa statute of registration.

Such an arrangement is not authorized by the statute

and is fraudulent in law and should be so regarded, because whatever the intent of the parties to it, its effect is in respect of matters not beneficial to the mortgagees, detrimental to the rights of others. It is as to this and not as to the construction of the statute, that the conflict of opinion exists between this court and the Supreme Court of Iowa.

The statute provides only that possession may be retained by the mortgagor when the mortgage is duly recorded. It makes the record of the mortgage, notice of the rights of the mortgagee.

This notice, however, is limited to what the mortgage contains. In the present case there were agreements outside the mortgage instrument not shown and not protected by the record, which were beneficial only to the mortgagor and prejudicial to his general creditors and therefore fraudulent both as matter of fact and of law. The record of an instrument does not change its nature. If the instrument is a fraudulent one, it is none the less so because recorded. Before the enactment of the recording statutes it was essential to the validity of an instrument, fair in its terms, that the mortgagee should take possession. The recording statute changes this only to the extent of permitting, in case of record, the possession to be retained by the mortgagor.

It may be conceded that the right to retain possession carries with it a right to make some use or disposition of the goods, as otherwise the right of possession might be a worthless one. But the nature of the use and disposition to be made of the property must be consistent with the purpose of the mortgage, as secured to the mortgagee, and must not be inconsistent with the rights of the general creditors.

We are concerned in this case, not with the recording statute of Iowa, but with the agreement partly written and partly resting in parol, made between Hamilton and Sperry, Watt & Garver. We insist that this agreement, is fraudulent and void, not because of any failure to comply with statutory requisites as to registration, but because of its substantive terms and conditions. The question is one not of local but of general jurisprudence. So much is implied if

not expressly decided in *Robinson* v. *Elliott* and *Means* v. *Dowd*. Each of those cases was decided upon principles of general jurisprudence, and nothing in either of them is in conflict with the policy or purpose of the recording acts of the several States.

In the eighth Federal Circuit the holding upon this question is as we contend.

In *Crooks* v. *Stuart*, 2d McCrary, 13, it is said:

"The question remains, whether these mortgages should be held void independently of the statute, upon the ground that the mortgagor retained the possession of the property, with power to dispose of the same in the usual course of trade.

As already stated, the proof shows that the mortgagor remained in possession and continued the business with the assent of the mortgagees. The case of *Robinson* v. *Elliott*, 22 Wallace, 513, is, we think, conclusive of this controversy. It was there distinctly held that a mortgage of chattels which permitted the mortgagor to retain possession until default in payment of the debt secured, with power to sell the goods as theretofore, was fraudulent and void in law, and could not be enforced by a court of equity.

Mr. Justice Davis, who delivered the opinion of the court, expressed the opinion that to sustain the validity of such a transaction, would be to permit the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and he adds, that 'a mortgage which in its very terms contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose.'

This is a doctrine of general jurisprudence not depending for its support upon any provision of State law, and we are, therefore, bound by the decision of the Supreme Court of the United States.

If there be anything in the decision of the Supreme Court of Iowa, in *Jordan* v. *Lendrum*, 10 N. W. R. 91, inconsistent with the doctrines announced in *Robinson* v. *Elliott*, *supra*, we must follow the latter and not the former.

This ruling was followed in *Wells* v. *Langbein*, 20 Fed. Rep. 183, and in other cases in that circuit, and is fully sustained by repeated decisions of this court.

"In all the various cases, which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 24th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State and the construction thereof adopted by the local tribunals, and to rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts, or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

Swift v. *Tyson*, 16 Peters, 1.

"With the greatest respect it may be proper to say that this court does not follow the State courts in their construc-

tion of a will or any other instrument, as they do in the construction of statutes."

Lane v. *Vick*, 3 How. 464.

"Whilst it will not be denied that the laws of the several States are of a binding authority upon their domestic tribunals and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws can not affect, either by enlargement or diminution the jurisdiction of the courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and Constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation."

Watson v. *Tarpley*, 18 Howard, 517.

"Attention is drawn to the fact that in a recent case not yet reported, the Supreme Court of the State, have held that these bonds are void, even in the hands of an innocent holder, but inasmnch as the power to issue bonds was fully conferred by law, the question of their validity in the hands of innocent holders, without notice, is a question of commercial law where the State adjudications, although entitled to great respect, do not furnish the rule of decision in this court."

Supervisors v. *Schenck*, 5 Wall. 784.

"This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the State courts, which may have exercised their judgment upon the same subject. This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the State does not effect the legal result."

Butz vs. *City of Muscatine*, 8 Wall. 584.

"It is urged on the part of the plaintiff in error, as the highest court in Louisiana, has on grounds of public pol-

icy refused to enforce contracts like this, since the abolition of slavery; that the thirty-fourth section of the judiciary act of 1879 obliges this court to follow that rule of decision. This is an erroneous view of the obligation imposed by that section on this court, as our decisions abundantly show. The provisions of that section do not apply, nor was it intended they should apply, to questions of a general nature not based on a local statute or usage, nor on any rule of law affecting titles to land, nor on any principle which had become a settled rule of property. The decisions of the State courts on all questions not thus affected are not conclusive authority, although they are entitled to, and will receive from us, attention and respect."

Boyce vs. *Tabb*, 18 Wallace, 548.

"Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company, which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. *Illinois Central Railroad Company* v. *Frankenberg*, 54 Ill. 88; *Illinois Central Railroad Co.* v. *Johnson*, 34 Id. 389.

Assuming that such is the purport of the decisions they are not binding on us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a State court must control. It is a matter of general law, upon which this court will exercise its own judgment. *Chicago City* v. *Robbins*, 2 Black. 418; *Railroad Company* v. *National Bank*, 102 U. S. 14; *Hough* v. *Railway Company*, 100 Id. 213.

If the doctrine of the Supreme Court of Illinois, as to what constitutes a contract of carriage over connecting lines of roads is sound, it ought to govern, not only in Illinois, but in other States, and yet tribunals of other States, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massachusetts. *Nutting* v. *Connecticut River Railroad Co.*, 1

Gray (Mass.), 502; *Burroughs* v. *Norwich & Worcester Railroad Co.*, 100 Mass. 26. If we are to follow on this subject the ruling of the State courts, we should be obliged to give a different interpretation to the same act—the reception of goods marked for a place beyond the road of the company in different States, holding it to imply one thing in Illinois and another in Massachusetts."

Myrick v. *Michigan Central R. R. Co.*, 107 U. S. 109.

"In conclusion, it has been urged against the judgment we have formed in favor of the right of the defendant, that several actions have been tried in Maine, where his interests have been brought in question as to the premises and decisions had against him; and that such local adjudications in respect to the titles of real estate should control the opinion of this court. 9 Cranch, 87; 2 Wheat. 316; 10 Wheat. 152; 12 Wheat. 153; 2 Gallis, 105. But on examining the particulars of the cases cited to govern this,—3 Fairfield, 398; 4 Shepard, 84, 88; 14 Main, 51,—it will be seen that the construction of the mortgage to the college, in respect to his reservation or condition, never appears to have been agitated. If it had been, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. 3 Sumner, 136, 277."

Foxcroft v. *Mallett*, 4 Howard, 379.

"But where private rights are to be determined by the application of common law rules alone, this court, although entertaining for the State tribunals the highest respect, does not feel bound by their decisions."

City of Chicago v. *Robbins*, 2 Black. 428.

We ask the court to adjudicate nothing with respect to the statutes of Iowa, but simply to pass upon and determine the nature of the agreement made between the defendant in error and Hamilton. Th is agreement we say is fraudulent independently of the recording statute. The determination of this question involves no consideration of a local nature.

This case is open for decision by this court upon its merits, and, tested by the principles declared in the cases cited, should be reversed.

The marshal was entitled to have the several instructions asked on his behalf given to the jury.

The instructions so asked and rejected, to which we call especial attention, are those set out in the first, second, fifth, sixth, eighth and ninth assignments of error.

The instruction set out in the first assignment was tantamount to a direction for the defendant, and the principle involved has been sufficiently considered already.

The second instruction embodied the doctrine of *Dowd* v. *Means*, treating the several mortgages executed by Hamilton as in effect one transaction, a general assignment, for the benefit of creditors, and void because of the stipulation in question

The instruction set out in the fifth assignment should certainly have been given, The refusal of this instruction, considered in connection with those given by the court and set out in the tenth, eleven and twelfth assignments of error show the doctrine of the trial court to be, that the mortgages, without regard to their effect upon other creditors, were valid, unless the intent of the mortgagor was to defraud, and the mortgagee shared this purpose and assisted in it.

The sixth assignment of error is for the refusal of the court to charge, that if Hamilton was unable to pay his debts as they matured in the regular course of business, he was insolvent.

The eighth and ninth assignments of error are for the refusal of the court to instruct the jury, that if Hamilton was left in possession of the mortgaged property with the right of continuing the business, buying and selling goods, and applying the proceeds to his own use, then such transactions are to be considered as evidence properly tending to show that the mortgages were fraudulent.

The sole test of fraud recognized by the State court is the intent of the parties to the mortgage. The court instructed the jury that "before such transactions could be held in-

valid as a fraud upon other creditors of said Hamilton, you should find from the evidence, that the purpose of the mortgagor was to defraud other creditors, and that the plaintiffs took such mortgages with knowledge of the mortgagor's fraudulent intention, and with the purpose on their part of assisting the mortgagor in carrying out his fraudulent purpose.

Such is not the rule of this tribunal. The effect of conduct as well as the motive is considered in civil cases. Because the effect of the agreement complained of was a matter, at the best, of indifference to the mortgagee, of benefit to the mortgagor, and of detriment to other creditors, it invalidated the mortgages. This result is not affected by the statute of Iowa, but flows from principles of general jurisprudence.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

FEB 27 1901
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

S. S. ETHERIDGE, PLAINTIFF IN ERROR,

vs.

SPERRY, WATT & CARTER, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

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Respectfully submitted.



Attorneys for Plaintiff in Error.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

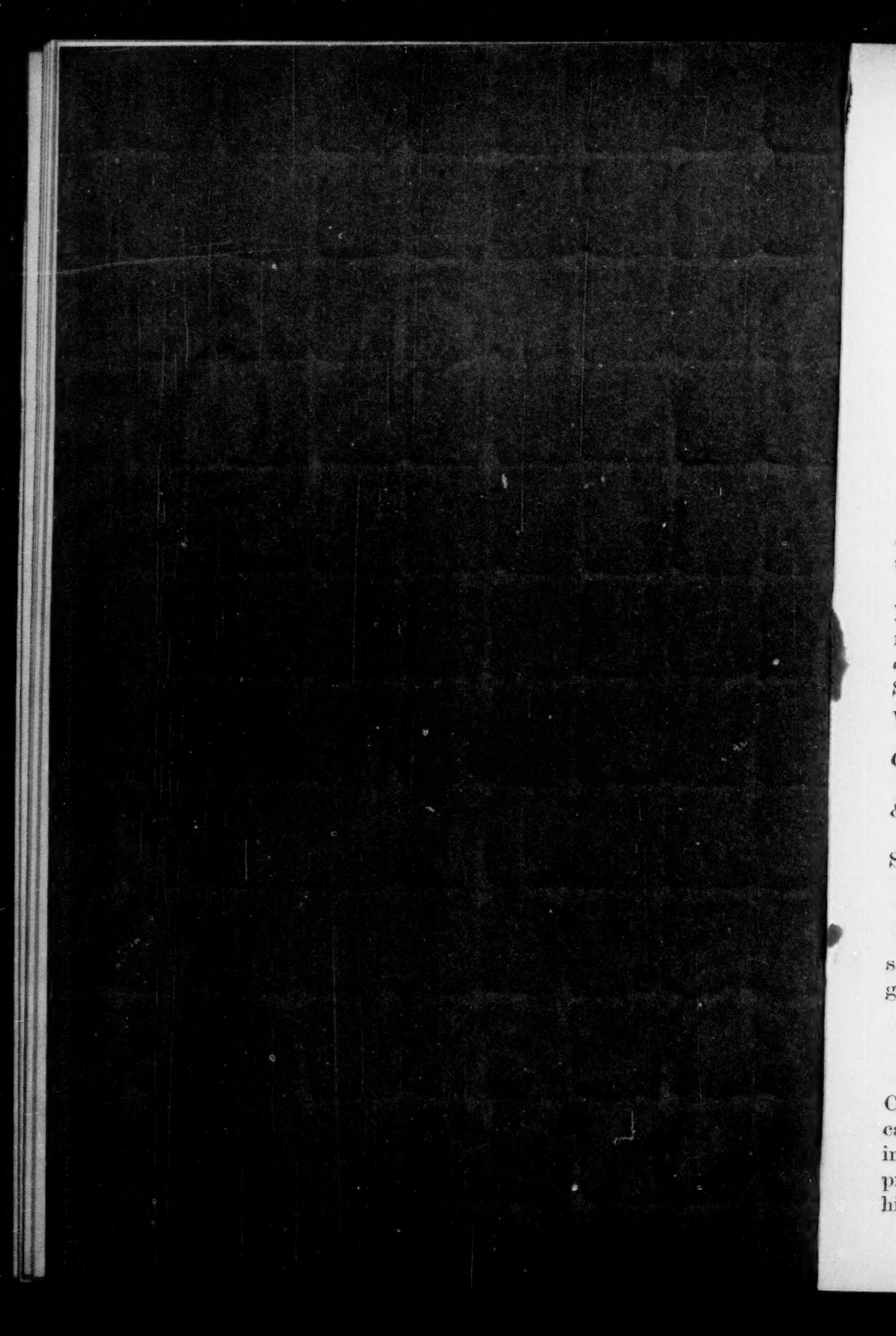
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STATEMENT.

I.

August 18, 1882, Sperry, Watt & Garver filed their petition in the Circuit Court of Polk county, Iowa, against the plaintiff in error, claiming damage for the conversion of personal property on which they held chattel mortgages.

September 21, 1882, Ethridge answered that he was U. S. Deputy Marshal and took said property by virtue of a general writ of attachment issued against Charles Douglas and George W. Hamilton in favor of Marshall Field & Co., from the United States Circuit Court, that Sperry, Watt & Garver's mortgages were fraudulent and the property was in fact owned by Geo. W. Hamilton.

October 7th, 1884, Ethridge petitioned to remove the cause to the Circuit Court of the United States, which was overruled.

September 22, 1885, Ethridge moved to substitute Marshall Field & Co., in his stead which was overruled.

September 29, 1885, a jury trial was had resulting in a verdict for Sperry, Watt & Garver on which judgment was entered.

March 5th, 1886, Ethridge appealed to the Iowa Supreme Court.

October 25th 1886, the judgment was affirmed.

September 14th, 1887, Ethridge petitioned for a writ of error under section 709 of the revised statutes of the United States which was granted.

II.

ARGUMENT.

Is there is Federal question arising on the record in this case? Counsel for plaintiff rely on Buck vs. Colbath 3, Wall 255. In that case the Marshal claimed that his authority protected him from suit in the state court and the sole question was, did it afford him this protection? In this case he claims that his position and his writ gave him the right to seize the property of Geo. W. Hamilton. The au-

thority held by him under the Federal statutes he does not claim went any farther than this. The defendants in error admit that such was his right, and the Supreme Court of Iowa held he had such authority. He did not claim he had authority to seize the property of defendants in error. So far as the authority of the plaintiff in error is concerned, under the United States statutes there exists a complete harmony of opinion. The real contention in this case is not in relation to the Marshal's authority under the Federal laws. The question is who owned the property seized? The mortgrges held by defendants in error are alleged to have been executed with a fraudulent intent and all the assignments of error are for instructions given or refused in relation to this allegation of fraud.

In McKenna vs. Simpson, 129 United States 506, a case where an assignee in bankruptcy brought suit in a state court to set aside certain conveyances as fraudulent, this court reviewed the authorties and in dismissing the writ held:

"The decision of a state court as to what should be deemed a fraudulent conveyance, does not present any Federal question, nor does the application by the court of the evidence in reaching that decision, raise one."

This court has always confined its consideration of questions arising in suits with Federal officers to a construction of the Federal law conferring the authority and has never strayed far enough from that to consider collateral questions of fact or general jurisprudence. To hold otherwise might bring before this court for review almost every conceivable question affecting the rights of property. Whenever a Federal officer seized a pig, its size, color, breed, title and market value might be brought for investigation to this court.

Counsel for plaintiff seek to sustain their position by citing, Lytle vs. Arkansas 22, How 193. In that case plaintiff in error claimed title under the preemption acts of 1830 and 1832, and in the court below his title was overthrown on the ground that he obtained his entry by fraud in fact, and fraud in law. There the plaintiff claimed "title under a statute of the United States" and to determine whether he had title or not, it was necessary to investigate what he had done to procure title. If in this case it had been denied that plaintiff in error was Deputy United States Marshal and the court below had held he was not, then there would be some similarity in the cases, and the case cited might help the plaintiff. In the Lytle case this court refused to investigate any collateral questions of title. The opinion says:

"In their answers the respondents rely on the act of limitations of the state of Arkansas for protection. As this is a defence having no

connection with the title of Cloyes, this court cannot revise the decree below in this repect, under the 25th section of the judiciary act.

Many of the defendants also relied in their answers on the fact that they were bona-fide purchasers of the lots of land they sued for and therefore no decree can be made here to oust them of their possession. The state courts found that a number of the respondents were purchasers without notice of Cloyes' claim and entitled to protection as bona-fide purchasers according to rules acted on by Courts of Equity. With this portion of the decree we have no power to interfere."

Counsel also cites Martin vs. Hunter's Lessee Wheat, 304, and Smith vs. Maryland 6, Cranch 28. There is no similarity between the cases cited and the one at bar.

In those cases the jurisdictional question was whether plaintiff in error had a title under a treaty. This question depends for its answer upon two lines of inquiry. What is the treaty and what rights has the claimant acquired under it? If congress had designed inquiries to be restricted to a construction of the treaty, why should the words "title claimed under" be inserted? The main object of this portion of the section is to protect individual rights under the treaty rather than to procure an abstract construction of the treaty. Far different is the clause which it is claimed confers jurisdiction in the case at bar. The words "where is drawn in question the validity of an authorily exercised under the United States," in their plain import restrict the investigation to the question of the validity ot the authority. In this case who has questioned the Marshal's authority? No one. The thing questioned here is not the Marshal's authority but the title of these defendants. The Marshal claims one George W. Hamilton owns the property, not under the laws of the United States, but under the laws of Iowa, and in accordance with principles of general jurisprudence. Defendants in error dispute this. This is the sole contention raised or decided. That this court will not review questions of general jurisprudence has been repeatedly decided. We refer to a few of the many cases so holding:

Bank of Tennessee vs. Citizen's Bank of Louisiana 14, Wall 9.

Palmer vs. Marston 14, Wall 10.

Sever vs. Haskell 14, Wall 12.

Nulten vs. Nichols 4, Wheat. 315.

McKenna vs. Simpson 129, U. S. 506.

"Where two defenses are made in a state court, and one of them not a Fedral question, is broad enough to sustain the decree, the Supreme Court without considering the Federal question will affirm the case."

See Hale vs. Akers 132, U. S. 565. and authorties cited and reviewed.

In Reclon vs. Ashley 6, Wall 143, where the plaintiff claimed under an act of congress. The court says:

"It is conceded that one of the points decided in the Supreme Court of the state against the plaintiff in error, would be a sufficient ground for the jurisdiction, if it were the only one on which that court decided the case, but it is claimed that the decree is also based on another and distinct ground, over which the court has no jurisdiction, and that therefore we cannot examine the first point. If there *is* this second ground on which the decree may still be supported, although the first were decided in favor of the plaintiff in error, it would be a useless labor to inquire into the correctness of the point which is of Federal cognizance; because, as the ruling of the state court must be assumed to be correct on the other proposition, no reversal could follow, if that proposition was sufficiently broad to sustain the decree."

Following the case last cited the ruling of the Supreme Court and the finding of the jury relative to the ownership of the property must be deemed correct. It being thus established that the defendant in the attachment suit had no such interest in the property attached, which, as was subject to attachment, the deputy Marshal under the full scope of all the authority which he claimed for himself is confessedly a trespasser.

III.

ASSIGNMENT OF ERRORS.

The first error assigned is the refusal of the court to charge the jury that if they found "the mortgagor was left in possession with no provision for the application of the entire proceeds of sales to the payment of the debts secured by the mortgages, but with the privilege express implied of continuing the business of buying and selling as before the making of the mortgages and applying a portion of the proceeds of sale to his own use then such mortgages are fraudulent."

The strenuous efforts of state courts to declare and define a kind of fraud which is without guile, or fraudulent design, have produced a multitude of decisions which conflict with each other, with logic and the plainest principles of justice. Out of this mighty mass, counsel have culled a few which they deem most favorable to their position. But none of them go to the extent of holding as provided in the instruction asked, that merely leaving the mortgagor in possession with an *implied* privilege of continuing the business and applying a portion of the proceeds to his own use renders the mortgage fraudulent. The mortgage in *Robinson vs. Elliott* and the assignment in *Means vs. Doud* were declared fraudulent because of stipulations contained in them, which not only provided for possession and disposition by the

mortgagor but by a renewal clause invested the debt secured with the prerogatives of eternal life.

Counsel cite Southard vs. Benner, Collins vs. Meyers and Orton vs. Orton to show that is immaterial whether the agreement appears in the instrument or is outside of it. The first was decided under a special statute making possession presumptive evidence of fraud. In the second the agreement was in the instrument. In the third the court says:

"We think where it appears either on the face of the mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor *unlimited power* to dispose of the property mortgaged for the use of the mortgagor, that the mortgage is void as to purchasers and attachment creditors of the mortgagor."

In the case of Miller Assignee vs Jones 15, N. Bank R., Mr. Justice Strong then presiding in the U. S. District Court in New Jersey, in a case where the validity of a certain chattel mortgage was in question, reviewed the case of Robinson vs. Elliott and said:

"Robinson vs. Elliott was not intended to rule that the possession of chattel mortgages might not be retained by the mortgagor, and retained by express agreement of the mortgagee. This was in effect conceded. It was the power given expressly by the mortgagee to the mortgagor to dispose of the mortgaged property for their own purposes, which in the judgment of the court stamped the mortgage with legal fraud; it was that which rendered the instrument in the opinion of the court no protection to the mortgagees, while it was a hinderance to other creditors. It has in many cases been decided that a mortgage of chattels which permits the mortgagor to remain in possession and to dispose of the goods in the ordinary course of his business is not of course fraudulent as a matter of law. The English registration acts and those of many of our states have at least, for their object protection of both the mortgagor and mortgagee in the retention of possession and use by the former and thus without any wrong to other creditors for provision is made for notice to them. But the retention of possession by the mortgagor involves necessarily the consumption in a greater or less degree the thing mortgaged. All personal property is consumed more or less by its use. Certainly the use involves a constant depreciation in value. If therefore authorized consumption of the chattels mortgaged renders the mortgage in all cases fraudulent, in law it follows that no valid mortgage of chattels can be made which stipulates for continued possession by the mortgagor. Then tho registration acts are wholly inoperative. But this is nowhere claimed. It was not in Robinson vs. Elliott. It has been held indeed in a few states that a chattel mortgage which stipulates that the mortgagor may continue in possession *and sell* the goods in the ordinary course of business, is constructively fraudulent, but the doctrine is denied in England, in Maine, Massachusetts, Iowa and Michigan." (Citing cases.)

The learned Justice then proceeded to distinguish the case before him from *Robinson vs. Elliott*, saying:

"There is no express agreement even that the mortgagor might continue in possession of the chattels mortgaged, though such an agreement may perhaps fairly be implied. * * * *

On the face of the instrument the property is absolutely pledged to the mortgagee as a security for the payment of the debt due him, and there is only an implied understanding that the possession might be retained until default in payment, or until attempt should be made to withdraw the property from the operation of the mortgage, coupled with an express negative of the right to sell and deliver the property to others. The case is not then within the words or reason of the rule asserted in Robinson vs. Elliott. * * * *

A court can not call to its aid a presumed or assumed collateral understanding adverse to or differing from the written contract of the parties. The existence or non-existence of such an understanding or agreement is a fact which like other facts must be found by the jury."

In the case at bar the mortgages provide that the mortgagee may take possession whenever he chooses so to do, and sell the property to pay the mortgage debt. It is not urged that the agreements contained in the mortgages are fraudulent. Any agreement outside, under the statute cited by counsel would be invalid, and could not in any way hinder or delay creditors in enforcing their claims. But surely to affect the validity of the mortgages it must have been a part of the agreement that brought them into being. Any agreement, arrangement or permission given after the execution of the mortgages can not render them fraudulent. Yet the instruction asked does not limit the jury to the agreement or arrangement under which the mortgages were made, in fact it does not even refer to such an agreement but confines itself to the act of "leaving the mortgagor in possession and for the slightess privilege that the jury might imply, that the mortgagor had of converting the slightest portion of the proceeds of a sale to his own use, the mortgages were to be declared void. The question is, did the court err in refusing to give such an instruction? Not what was the effect of a contemporaneous collateral agreement. Whatever effect such an agreement may have, the instruction asked was certainly erroneous in that it would avoid the mortgage on account of an arrangment made after its execution. Such an arrangement might have been shown and considered as evidence, tending to prove a prior agreement, but is not conclusive evidence that such arrangement was made. Therefore there was no error in refusing to give this instruction.

The second error assigned is the refusal of the court to give an instruction as to what the effect would be if they found among other

things that the mortgages in evidence covered all the mortgagors property subject to execution and constituted but one transaction, and were made for the purpose of winding up his business. There was no evidence to support such a finding. Mr. Hamilton testified that he had Three Hundred and Eighty-five Dollars, ($385), worth of property outside of the mortgages, and how much more does not appear. The evidence shows that all the mortgages were separate transactions made to separate creditors, at times when they were separately pressing for security, and that Hamilton always expected to so manage his affairs as to pay his debts and continue in business. The instruction asked was inapplicable and properly refused.

The third and fourth assignments are not insisted on. The fifth has no application to the mortgages in controversy, because they contain no provisions which it is claimed make them fraudulent in law. The sixth assignment standing alone is inmaterial. The seventh is not insisted on. The eighth and ninth assignments of error are for a failure to give certain instructions asked. The instructions asked are embodied in substance, in instruction 2½ given by the court.

Thus we see that the doctrine of honest fraud so earnestly urged by counsel was not raised in the court below and does not appear in the assignments of error. All that counsel claim may be true and still the judgment stand. But before dismissing the subject I will state my views on the general subject of constructive fraud as applied to mortgages on stocks of merchandise.

The essence of fraud is guile. To speak of fraud as unintentional is like speaking of a white blackbird. Yet for the want of a better term, certain contracts which operate as an unreasonable obstruction to third parties are called constructively fraudulent, to distinguish them from contracts made with a fraudulent intent. The right of an insolvent to dispose of his property to pay his debts, is unquestioned. He may sell all or any part to one creditor. He may sell or mortgage all or any portion to one person for money and divide the money as he sees fit. As long as he retains possession and control over his estate, he has a certain liberty and discretion in controlling and disposing of it with which the courts will not interfere as long as he proceeds with honest intent. But there is a bound beyond which—however honest his intentions may be—he cannot go. He cannot donate it to the most deserving charity. He must be just before he is generous. He can not sell it for a grossly inadequate price. He owes a duty to his creditors which will not permit him to sacrifice his property. But the insolvent is human, and very often is not possessed of the most astute judgment on business matters. If

his transactions are to be scrutinized with great care, and set aside whenever in the judgment of a court he could have made a better arrangement for himself or his creditors, the doctrine of constructive fraud will create great uncertainty, and the assets of the involvent be devoured by litigation instead of being devoted to the payment of his debts. Hence no conveyance should be condemned as constructively fraudulent unless it is of such a character as to show conclusively either a fraudulent intent or a reckless disregard of the rights of creditors. It is therefore necessary to inspect the entire transaction in its essence and surroundings before declaring it fraudulent in law. The recording acts were intended to benefit both mortgagor and mortgagee, as well as third parties. Under the statute of 13 Eliz., the necessity of taking possession by the mortgagee was a great source of inconvenience to him. He was incumbered with the care of property which might never be his in fact. The mortgagor was also deprived of the possession of property mortgaged, which in many cases he was in constant need of in his vocation. To dispense with this inconvenience the world is notified in a much more effective manner by requiring the contract to be put in writing; acknowledged and recorded on the public records. To these any one interested may go and ascertain the exact legal status of any property mortgaged. The mortgagor may then remain in possession without defrauding any one. Now being in possession, what arrangements may be properly made for handling the property? This evidently must depend upon the nature of the property. If it is gold bullion then perhaps he should simply guard it until the mortgage debt matures. But if it is a cow he certainly should feed and milk her. But if it is a stock of general merchandise in a rented store, where he has been selling goods at retail for many years, must he close the store, turn his customers away and take his chances of getting something to do to earn a living? Counsel for plaintiff would have him do this. If he does this the value of his merchandise depreciates one-half, the good-will of his store is entirely lost, all the profits that might be realized from continuing the business are gone, the merchant becomes a beggar for employment elsewhere, while rent, storage and interest accumulate against a stock which is rapidly becoming damaged, out of style, and unmarketable. That such a course would not benefit unsecured creditors is apparent. But it may be urged that the debtor should conduct his business, sell the goods at retail in the ordinary course of trade, and pay the entire proceeds on the mortgaged debts. If he is insolvent, he is unable to do so. Merchants who have money to hire clerks pay

rent and support their families for a considerable time, do not give chattel mortgages on their stocks. If an insolvent merchant conducts his store he must devote a portion of the proceeds of sales to pay the rent, clerk hire and other expenses of running it, and if his clerks and his landlord are to be paid why should not the merchant be also permitted to receive something for his labor, while he is struggling against the tide of misfortune to pay his debts. To say that he shall not, but must bear the burden without receiving a cent would necessitate hiring some one else less qualified and fitted for the task at a greater expense, or the closing of the store, and the selling of the goods at forced sale at great sacrifice. There may be many cases where an attempt to run the store would be unwise, but in the majority of cases creditors will realize vastly more by permitting the honest debtor to live and carry on his business until he can sell enough to pay his debts, even though he may in doing so be compelled to buy a few new goods to keep up certain lines of staples that may become exhausted. It certainly should not be held that allowing a mortgagor to thus continue his business for a short time in the absence of any showing of bad faith is of itself fraud in law. And that is all there is in the claim of fraud in this case.

Hamilton says:

"I understood it this way. That I was to pay them of course, but was to stay in possession of the goods as long as I acted honest. I was to sell the goods at retail, and apply the proceeds to the mortgages and for any other purposes. They reserved the right to take possession whenever they wanted to under the mortgages."

The first mortgage to defendants was due in installments of 60, 90 and 120 days and the second was given July 5th and due July 28th following. The time given was short. Any creditor who might so desire could at any time discharge the mortgages. Neither the mortgages nor the assumed collateral agreement operated as an obstruction to the creditors except so far as every mortgage is an obstruction.

IV.

The effect of a chattel mortgage in hindering or delaying creditors must in every case depend largely upon the statute law of the state. What shall be pronounced legal fraud must therefore be determined largely by the construction given of local statutes. The recording acts and provisions relating to conveyances must be considered. The remedies provided for reaching such property by attachment or execution are to be kept in mind. In Iowa these provisions are such that it is as easy to reach the interest of the mortgagor in a chattel mortgage as in real estate. What the effects the mortgages in contro-